



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Faculty Library



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1883.

BY

JNO. W. SHEPHERD,
STATE REPORTER.

40634

VOL. LXXIV.

MTGOMERY, ALA.:
PUBLISHED BY JOEL WHITE.

1885.

TABLE OF CASES.

Adams v. Munter & Brother, . . . 338	Clark v. Railroad Co. (E. T., V. & G.), . . . 443
Ala. Gold Life Insurance Co. ats. Chilton, . . . 290	Cochran v. Miller, . . . 50
Ala. Gold Life Insurance Co. v. Thomas, . . . 578	Cochran's Adm'r v. Sorrell, . . . 310
Ala. Gr. So. Railroad Co. ats. Jordan, . . . 85	Coffey v. Joseph, . . . 271
Allen v. Lewis, . . . 379	Coleman v. Siler, . . . 435
The State, . . . 557	Comer v. Sheehan, . . . 452
Allison ats. Robinson, . . . 254	Conner & Wife v. Smith, . . . 115
Allred v. Kennedy, . . . 326	Connor v. Jackson, . . . 464
Argall ats. Scaife, . . . 473	Cowan & Co. v. Sapp, . . . 44
	Crenshaw County ats. Giddens, 471
	Crockett v. Lide, . . . 301
Bailey, Davis & Co. v. Timber- lake, . . . 221	Daily's Adm'r v. Reid, . . . 415
Bain ats. Jackson, . . . 328	Daniel ats. Preston & Co., . . . 133
v. The State, . . . 38	Danner & Co. ats. Perry, . . . 485
Barber v. Williams, . . . 331	Dauphin & LaFayette Sts. Rail- way Co. v. Kennerly, . . . 583
Bates ats. Motes, . . . 374	Doe, <i>ex dem.</i> Pope v. Pickett, . . 122
Battle House Co. ats. Robbins, . 499	Stoutz v. Burke, . . . 530
Bayliss ats. Railroad Co. (E. T., V. & G.), . . . 150	
Beard's Heirs ats. Ryan, . . . 306	East Tenn., Va. & Ga. Railroad Co. v. Bayliss, . . . 150
Bell v. The State, . . . 420	East Tenn., Va. & Ga. Railroad Co. v. Clark, . . . 443
Tyson, . . . 353	Eberlein ats. Wolffe, . . . 99
Belmont Coal & Railroad Co. v. Smith, . . . 206	Eley & Mosely v. Norman, . . . 422
Black ats. Robertson, . . . 322	Ellington ats. Preston & Co., . . 133
Blackshear v. Burke, . . . 239	Epping & Flournoy v. Owens, . . 446
Bolman v. Lobman, . . . 507	Eslava ats. Sims, . . . 594
Brigham & Co. ats. Zelnicker, . 598	Evans, Fite, Porter & Co. v. Winston, . . . 349
Bromberg Brothers ats. Heyers Brothers, . . . 524	
Brown v. The State, . . . 42, 478	Falkner v. Campbell Printing Press Co., . . . 359
Bruton ats. Lewis, . . . 317	Farris & McCurdy v. Houston, . . 162
Burke ats. Blackshear, . . . 239	Finney ats. Toon, . . . 343
Doe, <i>d.</i> Stoutz, . . . 530	Flournoy & Epping v. Owens, . . 446
v. The State, . . . 399	Foster v. Napier, . . . 393
Cahall v. Citizens' Mutual Build- ing Association, . . . 539	Garland v. Watson, . . . 323
Campbell Printing Press Co. ats. Falkner, . . . 359	Giddens v. Crenshaw County, . . 471
Caruthers v. The State, . . . 406	Goetter, Weil & Co. ats. Jacoby, . 427
Cawthorn ats. Joseph, . . . 411	Gold Life Ins. Co. ats. Chilton, . 290
Chilton v. Ala. Gold Life Insur- ance Co., . . . 290	v. Thomas, . . . 578
Citizen's Mutual Building Asso- ciation ats. Cahall, . . . 539	Goodlett v. Kelly, . . . 213
City Council of Montgomery v. The State, <i>ex rel.</i> Stow, . . . 226	Gordon, Rankin & Co. v. Twee- dy, . . . 232
	Grabfelder & Co. ats. Wright, . 460
	Graham v. Ligon, . . . 432
	Myers & Co., . . . 432

Hanrick ats. Pollard,	334	May v. Marks,	249
Hawkins ats. Young,	370	McAnally v. The State,	9
Haynie ats. Knight,	542	McCarthy v. McCarthy,	546
Helms ats. Moore,	368	McCarty v. Williams,	295
Heyer Brothers v. Bromberg Brothers,	524	McCurdy & Farris v. Houston,	162
Hinson v. Williamson,	180	McKinney ats. Pettus,	108
Hobbs v. The State,	39	McMillan v. Otis,	560
Home Protection (Insurance Co.) v. Richards & Sons,	466	McQueen v. Lampley,	409
Houston ats. Farris & McCurdy,	162	McWhorter ats. Pruett,	315
Humes v. O'Bryan & Washing- ton,	64	Memphis & Charleston Railroad Co. v. Whorley,	264
Insurance Co. (Ala. Gold Life) ats. Chilton,	290	Miller v. Cochran,	50
Insurance Co. (Ala. Gold Life) v. Thomas,	578	Minnis ats. Wolfe,	386
Insurance Co. (Home Protection) v. Richards & Sons,	466	Mobile Life Ins. Co. v. Pruett, Randall,	487
Insurance Co. (Mobile Life) v. Pruett,	487	Mobile & Girard Railroad Co. ats. Kennedy Brothers,	430
Insurance Co. (Mobile Life) v. Randall,	170	Mobile & Spring Hill Railroad Co. v. Kennerly,	566
Ivey ats. Walker,	475	Montgomery (City Council of) ats. The State,	226
Jackson v. Bain,	328	Moore v. Helms,	368
ats. Connor,	464	Mosely & Eley v. Norman,	422
v. The State,	26	Moses Brothers ats. Noble,	604
Jacoby v. Goetter, Weil & Co.,	427	Moss ats. Roney,	390
Johnson v. The State,	537	Motes v. Bates,	374
Jordan v. Ala. Gr. So. Railroad Co.,	85	Munter & Brother ats. Adams,	338
Joseph v. Cawthorn,	411	Myers & Co. ats. Graham,	432
ats. Coffey,	271	Napier ats. Foster,	393
Kelly ats. Goodlett,	213	Noble v. Moses Brothers,	604
v. Turner,	513	Norman ats. Moseley & Eley,	422
Kennedy ats. Allred,	326	O'Bryan & Washington ats. Humes,	64
Kennedy Brothers v. M. & G. Railroad Co.,	430	Otis ats. McMillan,	560
Kennerly ats. M. & S. H. Rail- road Co.,	566	Owens ats. Flournoy & Epping, v. The State,	446
Kennerly ats. D. & L. F. St. Railway Co.,	583	Parmer v. Parmer,	285
Kilgore v. The State,	1	Perry v. Danner & Co.,	485
Knight v. Haynie,	542	Peters ats. Tabor,	90
Lampley ats. McQueen,	409	Peterson v. The State,	34
Lanier v. Russell,	364	Pettus v. McKinney,	108
Lewis ats. Allen,	379	Pickett v. Pope,	122
v. Bruton,	317	Pinney ats. Werborn,	591
Lide ats. Crockett,	301	Pollard v. Hanrick,	334
Ligon ats. Graham,	432	Pope ats. Pickett,	122
Lobman ats. Bolman,	507	Preston & Co. v. Daniel, Ellington,	133
Loeb & Weil v. Richardson,	311	Printing Press Manuf'g Co. ats. Falkner,	359
Marks ats. May,	249	Pruett ats. Mobile Life Ins. Co.,	487
Marsh v. Marsh,	418	Pruitt v. McWhorter,	315
Masson v. Turner,	513	Railroad Co. (Ala. Gr. So.) ats. Jordan,	85
		Railroad Co. (E. T., Va. & Ga.) v. Bayliss,	150
		Railroad Co. (E. T., V. & Ga.) v. Clark,	443

TABLE OF CASES.

VII

Railroad Co. (Mem. & Char.) v. Whorley,.....	264	State ats. Vincent,.....	274
Railroad Co. (Mobile & Girard) ats. Kennedy,.....	430	White,.....	31
Railroad Co. (Mobile & Spring Hill) v. Kennerly,.....	566	Williams,.....	18
Railroad Co. (South & North Ala.) v. Wood,.....	449	Wills,.....	21
Railway Co (Dauphin & La Fayette Streets) v. Kennerly,.....	583	<i>ex rel.</i> Stow v. City Council of Montgomery,.....	226
Randall ats. Mobile Life Ins. Co.,.....	170	Stoutz v. Burke,.....	530
Reid ats. Daily's Adm'r,.....	415	Stoutz & Co. ats. Young & Co.,	574
Richards & Sons ats. Home Protection (Insurance Co.),.....	466	Stuart ats. Wilkinson,.....	198
Richardson ats. Loeb & Weil,.....	311	Tabor v. Peters,.....	90
Robbins v. Battle House Co.,.....	499	Thomas ats. Ala. Gold Life Ins. Co.,.....	578
Robertson v. Black,.....	322	Timberlake ats. Bailey, Davis & Co.,.....	221
Robinson v. Allison,.....	254	Timberlake ats. Washington,.....	259
Roney v. Moss,.....	390	Toon v. Finney,.....	343
Roper ats. Wilkinson,.....	140	Turner ats. Kelly,.....	513
Ross v. The State,.....	532	Masson,.....	513
Roswald ats. Wing,.....	346	Tweedy ats. Gordon, Rankin & Co.,.....	232
Russell ats. Lanier,.....	364	Tyson ats. Bell,.....	353
Ryan v. Beard's Heirs,.....	306	Vincent v. The State,.....	274
Sapp ats. Cowan & Co.,.....	44	Walker v. Ivey,.....	475
Scaife v. Argall,.....	473	Washington v. Timberlake,.....	259
Schlosser ats. Welden,.....	355	Watson ats. Garland,.....	323
Searcy ats. Wilkinson,.....	243	Welden v. Schlosser,.....	355
Sheehan ats. Comer,.....	452	Werborn v. Pinney,.....	591
Shows ats. Sikes,.....	382	White v. The State,.....	31
Sikes v. Shows,.....	382	Whorley ats. M. & C. Railroad Co.,.....	264
Siler ats. Coleman,.....	435	Wilkinson v. Roper,.....	140
Simpson v. Williams,.....	344	Searcy,.....	243
Sims v. Eslava,.....	594	Stuart,.....	198
Smith ats. Belmont Coal & Railroad Co.,.....	206	Williams ats. Barber,.....	331
Smith ats. Conner & Wife,.....	115	v. McCarty,.....	295
Sorrell ats. Cochran's Adm'r,.....	310	ats. Simpson,.....	344
South & North Ala. Railroad Co. v. Wood,.....	449	v. State,.....	18
State ats. Allen,.....	557	Williamson ats. Hinson,.....	180
Bain,.....	38	Wills v. The State,.....	21
Bell,.....	420	Wing v. Roswald,.....	346
Brown,.....	42, 478	Winston ats. Evans, Fite, Porter & Co.,.....	349
Burke,.....	399	Wolfe v. Eberlein,.....	99
Caruthers,.....	406	Minnis,.....	386
Hobbs,.....	39	Wood ats. South & North Ala. Railroad Co.,.....	449
Jackson,.....	26	Wright v. Grabfelder & Co.,.....	460
Johnson,.....	537	Young v. Hawkins,.....	370
Kilgore,.....	1	Young & Co. v. Stoutz & Co.,	574
McAnally,.....	9	Zelnicker v. Brigham & Co.,...	598
Owens,.....	401		
Peterson,.....	34		
Ross,.....	532		

RULES OF PRACTICE IN SUPREME COURT.

RULE No.—. *Opening and conclusion of argument.*—The appellant in this court shall be entitled, ordinarily, to open and conclude the case; but, when there are cross-appeals, they shall be argued together as one case, and the plaintiff or complainant in the court below shall be entitled to open and conclude the argument.

Adopted December 11th, 1884.

It is ordered by the Court that Rule 22, of Rules of Court and Practice adopted by the Supreme Court of Alabama, be amended so as to read as follows:

22. *Mode of preparing transcript.*—The pages of the transcript shall be numbered. Each transcript shall be prefaced by an index of its contents, specifying the pages at which the various matters (as the writ, declaration, pleas, bill of exceptions, judgment, bill in chancery, answer of each defendant, deposition of each witness, each interlocutory order or decree, final decree, etc., etc.) are to be found. *The several answers of witnesses, as made in depositions, shall each follow consecutively the particular interrogatory to which it is responsive.* Marginal references to the several matters, as above, shall be made throughout the transcript. The transcript must be fastened together on the left side of the page, by ribbon or tape, so that the same may be secure, and every part conveniently read, and must be written in a fair, legible hand; and each paper or order composing such transcript must constitute at least one paragraph. No paper less than the sample furnished must form a part of such transcript, and the space within the margin must be filled with writing or printing, leaving appropriate spaces between the paragraphs with lines drawn along such spaces.

This amended rule shall take effect from and after the first day of April, 1885.

RULE OF PRACTICE IN CHANCERY.

RULE No.—. *Sales of personal property.*—The Chancellor in term time and in vacation, and the Register in vacation, may order the sale of any personal property in the hands of a receiver, executor, or administrator, over which the Chancery Court has taken jurisdiction. The application for such sale must be in writing, and when made before the Chancellor, the movant must give ten days notice of time and place of hearing to all parties in adverse interest, or their solicitors of record. When such application is to be heard before the Register, such Register must give the notice required above. From all rulings by the Register on such motion, either party may appeal to the Chancellor, without giving bond; such appeal to be heard at such time as the Register may appoint, not less than five days from the decision appealed from; and the costs of the appeal are to be taxed against the unsuccessful party. Sales under such orders shall be governed by the laws applicable to sales of personal property under orders of the Probate Court, and reports thereof shall be made to the Chancery Court.

Adopted February 18th, 1885.

CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1883.

Kilgore v. The State.

Indictment for Murder.

1. *Organization of grand jury.*—In the organization of the grand jury, when less than fifteen of the original *venire* appear, or the number of those appearing is from any cause reduced below fifteen, the court is authorized and required to make an order for the summons of "twice the number of persons required to complete the grand jury" (Code, § 4754); and the court may, in the exercise of this power, order the summons of twice as many persons as are necessary to make the number of grand jurors fifteen, eighteen, or any intermediate number.

2. *Dying declarations; admissibility of.*—Dying declarations should always be received as evidence with the greatest care and caution, and the court should rigorously scrutinize the primary facts upon which their admissibility as evidence depends; but, when these primary facts are clearly and satisfactorily shown—that the deceased was at the time *in extremis*, and that he was under a sense of impending death—the evidence must be received, leaving the jury to decide upon its weight and credibility.

3. *Proof of good character; weight and effect of.*—In all criminal prosecutions, the previous good character of the defendant, having reference and analogy to the subject of the prosecution, is competent and relevant evidence for him as original testimony; but, when the jury, considering the proof of good character in connection with the criminating evidence, are satisfied beyond a reasonable doubt of his guilt, a verdict of guilty ought to follow.

4. *Homicide committed in attempt to rob, ravish, &c.*—A homicide committed in the attempt to perpetrate a robbery, or other felony specified in the statute (Code, § 4295), is murder in the first degree, without any consideration of malice, or a specific intent to kill.

5. *Alibi as defense, and failure to prove it.*—An unsuccessful attempt to prove an *alibi*, in a criminal case, is not "always a circumstance of great weight against the prisoner, because the resort to that kind of evidence is an admission of the truth of the facts alleged, and the correctness of the inferences drawn from them, if they remain uncontradicted" (*Porter v. The State*, 55 Ala. 105); yet such failure, like the failure to prove or explain any other material fact, which the defendant had (or is presumed to have had) the means of proving or explaining, is

[Kilgore v. The State.]

a circumstance to be weighed and considered by the jury, in determining the question of his guilt.

6. *General verdict, on indictment containing two or more counts.*—When an indictment for murder contains two or more counts, differing only in the description of the means or instrument by which the homicide was committed, the jury can not be required to specify in their verdict on which count it is founded.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The indictment in this case contained two counts, charging that the defendant, Sandy Kilgore, a freedman, “unlawfully and with malice aforethought killed John Wesley Hill, *alias* Wesley Hill, by cutting or stabbing him with a knife;” or, as alleged in the second count, “by striking him with some heavy instrument, to the grand jury unknown.” There was no objection to the indictment, in the court below, nor to the grand jury by which it was found; but the record shows that, of the seventeen persons summoned as grand jurors, two failed to appear, and two of those appearing were excused by the court; that the court thereupon made an order, directing the sheriff to summon six other persons from the qualified citizens of the county, and that the jury was then completed by drawing three of the six persons so summoned. The defendant pleaded not guilty, and was tried on issue joined on that plea; and he was convicted of murder in the first degree, and sentenced to the penitentiary for life.

On the trial, as appears from the bill of exceptions, the State having proved “that the deceased was stabbed and struck on the head, in front of the residence of Mrs. Cozart, near the city of Montgomery, on the night of June 2d, 1883, between the hours of nine and ten o’clock, and died on the 9th June thereafter,” proposed to read as evidence the dying declarations of said Hill, as reduced to writing by John B. Fuller, a justice of the peace, who attended him for that purpose, who testified that, “when he reached said Hill’s bed-side, and asked him if he thought he would recover, or get well, Hill replied, ‘*That is with the doctor;*’ that after some conversation, in which witness explained to Hill that he had come to take his dying declaration, and could not take it if he had any hope of recovery, Hill then said that he had no hope of getting well; and that he, witness, then wrote out the statement of the deceased as his dying declaration, sworn to and subscribed,” as follows:

“I am aware of my condition, and believe that I can not recover from the injuries received last Saturday night; and I make this dying declaration and statement on oath. On last Saturday night, about nine o’clock or later, while on my way

[Kilgore v. The State.]

home, and when I was in front of Mrs. Cozart's residence, I saw the defendant advancing towards me. I was walking. He told me to halt. I checked my speed, and told him I was going about my business. He advanced to me, and within one yard of me, and cut or struck me on the left side of my head, in the left temple, and thereby cut out my eye, and then cut me in the lip. I retreated, and called for help. The defendant then advanced on me, and struck me on the head with a piece of timber, while I was trying to open the front gate to Mrs. Cozart's premises. I drew my knife after he first cut me, but did not use it, and it was knocked out of my hand when he struck me with the piece of timber. I was senseless after receiving the lick, but soon recovered; and as soon as I got able to realize my condition, I found the defendant cutting me with a knife. He cut me several times, while I was on the ground, and continued to cut me until I was not able to move. He then began to search my pockets, and took five dollars," which were described, and the pocket-book in which the money was. "I was on the ground, and was bleeding freely, and did not see the defendant when he left. I never saw him before that night. I do not know where he lives. I saw him this evening in charge of Capt. Gerald and Policemen Payne and Carter. I recognize him as the person who assaulted and robbed me. I can't be mistaken about the defendant being the person. I am positive he is the man. It was not too dark at the time for me to recognize a man one yard off, and I know that he is the person who assaulted me."

Dr. Blue, a practicing physician, who was called to see the deceased the night he was assaulted, described the wounds, and declared his opinion that the deceased died from the effect of them; and he further testified, also, "that he called to see the deceased every day from the 3d to the 9th June, and sometimes two or three times per day, and tried to encourage him, but could not succeed in arousing the slightest hope of his recovery; that the deceased frequently spoke of his condition, and expressed the belief that he would die from the effect of the wounds, and never once expressed any hope of his recovery; that he was in a stupor most of the time, as if he had taken morphine, but, when aroused, was conversing and intelligent; that said Hill, when witness first visited him, seemed to be especially uneasy about the two cuts on his face, one above the eye, and the other on the lip, lest they might cause scars; that he had been assured they were not serious, and would soon be well; that while he (witness) told the deceased his wounds were dangerous, he never told him they were fatal, but at all times gave him such encouragement as would tend to keep him in a hopeful and cheerful condition; and that he was the only

[Kilgore v. The State.]

patient, in all his professional experience, in whom he had not been able to infuse some hope." On this evidence, the court admitted the dying declarations as evidence; and the defendant excepted to their admission.

Two other witnesses for the State, negro women, who were attracted to the spot by the cries of the deceased, testified that they saw a man walking rapidly away; and they identified the defendant as that man, though they had never seen him before, and though it was proved that the night was too dark to enable a person to recognize any one at a considerable distance. "The evidence on the part of the defendant tended to show that, on the night of the stabbing, he was at the 'Dollar Store' in the city of Montgomery, between nine and ten o'clock; that his wife lived at the house of Mrs. Cozart, but he did not live with her; that he was a stranger in Montgomery, and boarded temporarily with one Sarah Williams; that he came to her house, on the night of the stabbing, about eleven o'clock, and asked admission; and that she admitted him, after some hesitation, and sent him into the kitchen. Sarah Williams testified that, after the defendant got into the kitchen, he asked for a light and some water, both of which she furnished him; that he asked for a second pan of water, and she gave it to him, and, having some curiosity to know why he wanted two pans of water, she peeped through an opening into the kitchen, and saw him scrubbing his shirt and clothes; that he slept in the kitchen all night, and on the next morning asked to lie down on her bed for a while, and she permitted him to do so; that when she came into the room, a short time afterwards, the defendant was gone, and that she discovered a shirt between the mattresses of the bed," which was produced, and identified by the witness, "and which was, she swore, the shirt defendant wore the day before the killing; and that when she asked the defendant about his using the two pans of water, he said that his nose had been bleeding, and also that he had spilt some medicine on his clothes. There was evidence, also, tending to show that there were small stains of blood on the wristbands of said shirt, and that the defendant, when arrested, had some blood on the front part of his coat; and there was, also, evidence tending to show that, when he was arrested, one of his fingers had the appearance of having been recently cut." The evidence showed, also, that the house of said Sarah Williams was on Madison street in the north-eastern part of the city of Montgomery, more than a mile distant from the residence of Mrs. Cozart, which was at the extreme southern end of Perry street, outside of the city limits. Several witnesses for the defendant testified "that he was a man of good character."

[Kilgore v. The State.]

The above being "substantially all the evidence," the court charged the jury, on the request of the solicitor, 1st, "that if they are satisfied beyond a reasonable doubt of the guilt of the defendant, from all the evidence in the case, good character included, then they should find him guilty, notwithstanding he may have proved good character;" 2d, "that if the jury believe from the evidence, beyond a reasonable doubt, that the defendant killed John Wesley Hill, in this county, and before the finding of this indictment, in the perpetration or attempt to perpetrate a robbery, then they should find him guilty of murder in the first degree;" 3d, "that an unsuccessful attempt to prove an *alibi*, in a criminal case, is a circumstance to be weighed against the defendant." The defendant excepted to each of these charges, and requested the following charges, which were in writing: 1st, "that though the jury should believe, from the evidence, that the defendant did cut and strike said Hill, and thereby inflict wounds from which he afterwards died, yet, if they are not also positively convinced, beyond a reasonable doubt, that he did so willfully, deliberately, maliciously, and with premeditation, he can not be found guilty as charged in the indictment;" 2d, "that the jury, if they find the defendant guilty, must state in their verdict on which count or counts they so find him guilty." The court refused each of these charges, and the defendant excepted to their refusal.

WATTS & SOX, for the appellant.—(1.) The record shows a fatal defect in the organization of the grand jury. If fifteen of the number originally summoned had appeared and been accepted, the court would have had no power at all to add to their number, fifteen being a competent grand jury.—*Berry v. The State*, 63 Ala. 126. When less than fifteen appear and are accepted, the court is authorized and required to make an order for the summoning of "twice the number of persons required to complete the grand jury" (Code, § 4754); that is, twice the number necessary to complete it; and fifteen being a full and complete grand jury, twice the number below fifteen must be the number to be summoned to supply the deficiency, and any excess above that is unauthorized. (2.) Dying declarations, to be admissible as evidence, must be made at the very point of death, and when the declarant is fully conscious of impending dissolution.—*Morgan v. The State*, 31 Ind. 193; *McDaniel v. The State*, 8 S. & M. 401; *Brown v. The State*, 32 Miss. 433; *Com. v. Roberts*, 108 Mass. 296; *State v. Ferguson*, 2 Hill, S. C. 282; *State v. Tilghman*, 11 Ired. 513; *Starkey v. People*, 17 Ill. 17; *State v. Center*, 35 Vt. 378; *Moore v. The State*, 12 Ala. 764; *McHugh v. The State*, 31

[Kilgore v. The State.]

Ala. 317; *Reynolds v. The State*, 68 Ala. 502; 1 Greenl. Ev. § 158; *Walker v. The State*, 52 Ala. 192. Here, the evidence only shows that the declarant expressed the belief "that he could not recover from the wounds" which he had received, and that he was especially afraid that scars might be left on his face, although he had been assured that the wounds on his face were not serious; and that he declared his recovery depended on the doctor, who never told him that his wounds were fatal. This falls far short of that sense of impending death which makes such declarations competent evidence. (3.) An unsuccessful attempt to prove an *alibi* is entitled to no greater weight against the accused, than his failure to prove any other fact material to his defense; though the rule may be different, where there is a fraudulent attempt to prove an *alibi*. *Collins v. State*, 20 Iowa, 85; *Miller v. People*, 39 Ill. 457; *Taber v. State*, 16 Ohio St. 583; *White v. State*, 31 Ind. 262; *Adams v. State*, 42 Ind. 373; *State v. Josey*, 64 N. C. 56; *Williams v. State*, 47 Ala. 659; *Spencer v. State*, 50 Ala. 124; *Porter v. State*, 55 Ala. 95. The charge of the court, on this point, invades the province of the jury, in assuming that there was an unsuccessful attempt to prove an *alibi*.—*Bank v. Jones*, 59 Ala. 123.

H. C. TOMPKINS, Attorney-General, for the State.—(1.) A grand jury may consist of fifteen, eighteen, or any intermediate number of persons; and when the number of those originally summoned is reduced below fifteen, the court has a discretionary power, within the two extremes, as to the number to be summoned.—*Yancey v. The State*, 63 Ala. 141. (2.) The declarations of the deceased were properly admitted.—*McLean v. The State*, 16 Ala. 672; *Oliver v. The State*, 17 Ala. 587; *Johnson v. The State*, 47 Ala. 1; *Faire v. The State*, 58 Ala. 74; *Green v. The State*, 66 Ala. 40. (3.) The charge of the court asserts that an unsuccessful attempt to prove an *alibi*, like an unsuccessful attempt to prove any other material fact, is a circumstance to be weighed against the defendant; and this is a correct proposition.—*Porter v. The State*, 55 Ala. 95; *Com. v. Costly*, 118 Mass. 1; *Burrill's Cir. Ev.* 519. (4.) A homicide committed in the attempt to rob, or to perpetrate any other one of the felonies specified in the statute, is declared murder in the first degree.—Code, § 4295; *Mitchell v. The State*, 60 Ala. 26; 1 Leigh, Va. 610. (5.) The jury had the right to return a general verdict of guilty, without specifying the count on which their verdict was founded.—Clark's Manual, § 2525.

BRICKELL, C. J.—1. The objections to the formation of
VOL. LXXIV.

[Kilgore v. The State.]

the grand jury are not well taken. It was organized, impanelled and sworn, in conformity to the statute.—Code of 1876, § 4754. Fifteen only of the original *venire* having appeared, and two of them being excused from service, the contingency existed in which the court had power, and it became a duty, to complete the jury, by ordering the summons of a sufficient number of qualified citizens to supply the deficiency. In the exercise of this power, the court could order a summons of only such number as would increase the jury to fifteen, or of such number as would increase it to eighteen, or to an intervening number, as in its discretion was deemed best for the administration of justice. Either number would, under the statute, complete the grand jury when impanelled and sworn, and the selection of either is not an excess of the power conferred upon the court.—*Yancey v. The State*, 63 Ala. 141.

2. There was no error in admitting the dying declarations of the deceased. The matter of these declarations was, the circumstances under which the injuries of which the deceased was languishing had been inflicted, and the person by whom they were inflicted. They were made when he was *in extremis*, and when he was conscious that from the injuries he must die. From the day he suffered them, to the day of his death, uniformly he expressed the belief and expectation that from them he must die, and all the efforts of his medical attendant to encourage or inspire a hope of recovery were unavailing. This species of testimony should always be received with the greatest caution, and most rigorously should the courts scrutinize the primary facts upon which its admissibility is authorized. But, when the two facts upon which the law authorizes its introduction are satisfactorily and clearly shown—the fact that at the time of making the declarations the deceased was in extremity, and under a sense of impending death, that he was without hope of life—they must be received, leaving to the jury, who must pronounce upon their weight, all infirmative considerations affecting their credibility.—*Moore v. State*, 12 Ala. 764; *McLean v. State*, 16 Ala. 672; *Oliver v. State*, 17 Ala. 587; *McHugh v. State*, 31 Ala. 317; *Mose v. State*, 35 Ala. 421; *Faire v. State*, 58 Ala. 74.

3. In all criminal prosecutions, whether for felony, or for misdemeanor, the previous good character of the accused, having reference and analogy to the subject of the prosecution, is competent and relevant as original testimony; it is a fact which must be submitted to the jury, and ought to be considered by them in determining whether he is guilty or the offense with which he is charged. But, if, when the good character is shown, and it is considered in connection with the evidence criminating the accused, the jury are persuaded beyond a reasonable doubt

[Kilgore v. The State.]

of his guilt, a verdict of conviction ought to follow; and it is this proposition which is embodied in the charge given by the City Court, to which the second exception of the appellant refers.

4. A homicide, committed in the attempt to perpetrate either of the felonies, arson, rape, robbery or burglary, is by the statute pronounced murder in the first degree.—Code of 1876, § 4295. The criminal intent, which is involved in the attempt to commit either of these felonies, gives complexion to, and determines the character of the killing which may be consequent. It supplies the place of “malice aforethought” of the common law, the essential and distinguishing characteristic of murder, and of the specific intent to take life, or the “willful, deliberate, malicious and premeditated killing,” which is the element of one class of homicides the statute denounces and punishes as murder in the first degree.—*Fields v. State*, 52 Ala. 348; *Mitchell v. State*, 60 Ala. 26; *People v. Sanchez*, 24 Cal. 17. The charge given by the City Court on this point was free from error, and that requested by the appellant was properly refused.

5. A deliberate consideration of the evidence introduced by the prosecution, criminating or tending to criminate the appellant, can but lead a candid mind to the conclusion, that he ought to give, if he would resist its force, an account of his whereabouts at the time the injuries were inflicted upon the deceased, or of some other fact which would lessen the force of the circumstances, and of the facts pressing against him. If he attempt explanation, or contradiction, or an account of himself at the time when the crime was committed, and the explanation or contradiction is not successful or satisfactory, or the account given of himself can not be accepted as true, the jury will weigh these facts against him; not as absolute or conclusive of guilt, but as influential, and as tending to corroborate the criminating evidence. The general proposition is true, that upon the prosecution rests the burden of proving the guilt of the defendant, and of proving it beyond a reasonable doubt; and that he is not under a duty of establishing his innocence; yet, if he assumes to give explanations of his conduct, or to account for his absence from the scene of crime, or to prove any fact resting in his own knowledge, and of which, if it exists, he must have the peculiar means of proof, and fails, the fact of failure must be weighed or considered in determining his guilt. Its value, and the importance which should be attached to it, depend upon the character of the criminating evidence, and is for the determination of the jury.

In *Porter v. State*, 55 Ala. 107, the court said: “An attempt to prove any material fact, followed by a failure, is a circum-

[McAnally v. The State.]

stance to be weighed against the party making it." There are authorities pronouncing that "an unsuccessful attempt to establish an *alibi* is always a circumstance of great weight against a prisoner, because the resort to that kind of evidence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inferences drawn from them, if they remain uncontradicted."—Wills Cir. Ev. 83; Burrill's Cir. Ev. 519. This doctrine was expressly repudiated in *Porter v. State*, *supra*, and the failure to make the proof was declared no more than a circumstance to be weighed against the prisoner, as would be the fact that he left unexplained or uncontradicted any other criminating circumstance he had, or is presumed to have, the means of explaining or contradicting.—*Gordon v. People*, 33 N. Y. 501. We find no error in the charge of the City Court, touching the failure of the defendant to prove an *alibi*.

6. There was no error in the refusal to instruct the jury, that by the verdict they must specify upon which of the two counts of the indictment they found the defendant guilty. Each count is in form sufficient, and the only difference is in the description of the means by which the unlawful and malicious killing was perpetrated. When the several counts of an indictment are in proper legal form, and relate to a single offense, and a conviction upon either requires the same judgment and the same sentence as a conviction upon all would, a general verdict is all that the law requires.—*State v. Wright*, 53 Me. 328; *Commonwealth v. Desmarteau*, 16 Gray, 1; *Jackson v. State*, at present term.

We find no error in the record, and the judgment must be affirmed.

McAnally v. The State.

Indictment for Murder.

1. *Declarations and conduct of conspirators, as evidence against each other.*—In charges of crime which, in their nature, may be perpetrated by more than one guilty participant, if there be a previously formed purpose to commit the offense, the acts, declarations and conduct of each conspirator, in promotion of the object or purpose of such conspiracy, or in relation to it, become the acts, declarations and conduct of the others, and are competent evidence against them; but the sufficiency of such evidence must be determined by the jury, and, before it can be admitted to go to them, a foundation should be laid, by proof addressed to the court, *prima facie* sufficient to establish the existence of such conspiracy.

2. *Alibi as defense.*—When an *alibi* is set up as a defense, a charge to

[McAnally v. The State.]

the jury, given at the instance of the prosecuting officer, asserting that "it is essential to the sufficiency of such defense that it cover and account for so much of the time of the transaction as to render it impossible the prisoner could have committed the offense," lays down too exacting a rule.

3. *Proof of malice; former difficulty.*—Proof of a former difficulty between the defendants and the deceased tends to show malice, and is admissible for that purpose; but the particulars or merits of that difficulty can not be inquired into.

FROM the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

The indictment in this case was found at the May term, 1881, and charged that the defendants, Willis McAnally, James McAnally, Reuben McAnally, Philip Musgrove, Joseph Musgrove and William Musgrove, "unlawfully, and with malice aforethought, killed Frank A. Hanna, by shooting him with a gun." A change of venue was granted to Philip Musgrove and William Musgrove, on their application; and the other defendants being jointly tried, and each pleading not guilty, all were acquitted except said Willis McAnally, who was convicted of murder in the first degree, and sentenced to the penitentiary for life. The case is brought to this court by said Willis McAnally, on a bill of exceptions reserved during the trial, which purports to set out, "in substance, all the evidence offered to the jury on the trial," and states these facts: "The State offered evidence showing that said Frank A. Hanna was shot and killed at the house of Thomas B. McAnally, in said county, on the 23d April, 1881, between the hours of eight and nine o'clock at night; that he was sitting at the time of the killing near an open door, reading a newspaper, which he held in one hand, and holding a small brass lamp in the other. Said Thos. B. McAnally had just lain down on a bed in the same room, when a gun fired, with a report, as described by him, like a blast, and the room was instantly in darkness. As soon as possible, said Thos. B. McAnally lit a lamp, and found the deceased lying upon the floor dead. The missile of death was a single large ball, which passed through and shattered the bones of the right arm about the wrist, and then, entering the right side, passed nearly through the deceased, and lodged under the left shoulder-blade. The next morning after the killing, a piece of patching was found, in or near a path leading from the door to a fence, and about twelve or fifteen feet from the door;" and the patching was produced, some peculiarities being described as tending to identify the gun from which the shot was fired. "On the same morning an inquest was held over the body of the deceased, and on the Monday morning afterwards a ball was extracted from it, which was offered in evidence. For a number of years before April, 1881, the deceased had resided at Bangor,

[McAnally v. The State.]

Alabama, but was not staying there when shot. A few months prior thereto, he had sent his children to Murphree's Valley, and he himself had gone to Flint, in Morgan county, and thence to Birmingham, on business; and he had come from Birmingham to the house of said Thos. B. McAnally, on Friday evening before the Saturday night on which he was killed. The Circuit Court at Blountsville began on April 25th, 1881, and the deceased was on his way from Birmingham in attendance upon said court. It was shown that he went with said Thomas McAnally to Bangor in the afternoon of April 23d, 1881, and remained there until about half an hour before sunset; and the house of said McAnally was distant from Bangor about one mile, most of the distance being up hill. The evidence adduced on the trial, by which it was sought to fix the guilt of this assassination on the defendants, was entirely circumstantial as to each and all of them; and the circumstances offered for this purpose were substantially as follows:

"1. *As to the proximity of the defendants to the place of the killing:* It was shown that, at the time of the killing, Joseph Musgrove, one of the defendants, resided at Bangor, was railroad agent at the time, and was at Bangor all day on said April 23d; that he was at his home in Bangor that night when one Rutledge went there with the news of the killing; that Willis McAnally, one of said defendants, was then staying or boarding with said Joseph Musgrove, sleeping at night in the ticket office, and assisting said Joseph as agent of the railroad; and that said Willis was at Bangor the day and night of the killing. It was shown that Reuben McAnally, one of the defendants, resided between two and three miles from Bangor, and about one mile and a half from the house of said Thos. B. McAnally; that on the morning of said April 23d, passing through Bangor, he went to Blount Springs, remained there until in the afternoon, and returned through Bangor, being seen there about sundown, where he remained a few minutes, and then left for home in company with one Rutledge, a witness for the State, carrying a plow point and an iron bolt; and that said Rutledge accompanied him until they passed Thomas McAnally's house, when they separated, after dark, each going in the direction of his own home. It was shown that James McAnally, one of said defendants, resided about two and a half miles from Bangor, and was at Bangor, and in the depot, on the afternoon of said April 23d; and that he left Bangor before sundown, with a sack of flour, going in the direction of home, and in company with one Jett, who was a witness for the State. The State offered evidence, also, showing that Philip M. Musgrove, indicted but not on trial, and who, at the time of the killing, resided at Cullman, Alabama, was seen passing through Garden City, about

[McAnally v. The State.]

three miles from Bangor, on the afternoon of said April 23d, about an hour by sun, going in the direction of Bangor, and was seen at Bangor early the next morning after the killing; while the evidence of the defense tended to show that he got to the house of his son, said Joseph Musgrove, at Bangor, about dark, remained there until after nine o'clock at night, and then went, in company with William H. Musgrove, to the house of Gordon Musgrove, also a son of said Philip, then residing at Bangor, where he slept that night. As to said William H. Musgrove, also indicted but not on trial, it was shown that he resided, at the time of the killing, ten or twelve miles from Bangor, in the direction of Blountsville; and one Cole, a witness for the State, testified that he saw said William H. at church at 'Fowler's Cove,' about eight miles from Bangor, during and after the morning service on said 23d April, and then and there had a conversation with him. Said witness was then asked by the prosecuting officer, '*What did said William H. Musgrove say to you there?*' The defendants on trial, including said Willis McAnally, objected to this question, and duly excepted to the overruling of their objection. The witness answered, that said W. H. Musgrove told him that he was going to Hanceville, and that he wanted to get witnesses to invalidate the oath of the deceased."

"In behalf of said Joseph Musgrove and Willis McAnally, the deposition of Mrs. Jane Berrier was read to the jury, who was the mother-in-law of said Joseph Musgrove, and who testified, in substance, that she was at home, at said Joseph's house, on the night of the killing, and said Joseph, Willis, Philip and William H. were all at the house, from about eight o'clock, or dark, until a little after nine, when they all left in the direction of the depot; that said Joseph came back in about ten minutes, and had been back about fifteen or twenty minutes, as well as she could remember, and was in a room giving medicine to his sick children, when said Rutledge came, and called, and said that some one had killed Frank Hanna, and wanted said Joseph to go with him to the place of the killing; that when Rutledge came up, and while he and witness were talking, said Joseph came out where they were, and said to Rutledge, '*Is it possible?*' or, '*Aint you joking?*' to which Rutledge answered, '*No, I am not joking, and I want you to go with me;*' and that said Joseph went with him. Jeff. Murphree, a colored man, was also examined as a witness for said two defendants, and testified that, on the day of the killing, he was in the employment of said Joseph Musgrove; that he had been out hunting on that evening, and got in after sunset; that Dr. (Philip) Musgrove was at said Joseph's when he got home, and ate supper with the family; that William H. Musgrove came in after supper, and

[McAnally v. The State.]

supper was fixed for him after the others had finished, and witness afterwards had his supper; that he (witness) then went to the house of William Warren, a colored man, from fifty to one hundred yards distant, and left said Joseph Musgrove in his room writing, and Dr. Philip, William H., and Willis McAnally were sitting on the front porch, laughing and talking as usual; that he (witness) went to said Warren's between eight and nine o'clock, and had been there fifteen or twenty minutes, and had just lain down, when he heard a gun fired." Gordon Musgrove, who was also a son of said Joseph Musgrove, and who was examined as a witness for said Joseph and Willis, testified that said Joseph and Philip came to his house on the night of the killing, "about fifteen or twenty minutes after nine o'clock, and went into an adjoining room to sleep about half an hour thereafter." "For Reuben and James McAnally, in addition to the evidence before stated, there was testimony tending to show that, at the time of the killing, they were at their respective homes, distant more than a mile from the house of said Thomas B. McAnally; but such testimony was not any stronger, or more reliable, than that above stated tending to establish an *alibi* for said Joseph Musgrove and Willis McAnally. There was no other evidence as to proximity, as to any of the defendants indicted or on trial."

"As to the *motive, statements, threats, &c.*, the State offered evidence tending to show that, during court at Blountsville about five years ago, and at other places and times about five years ago, said Willis McAnally had threatened to kill the deceased,—at one time saying that he would kill him if it took him twenty years to do it; but no threats were made by said Willis within less than five years before the trial, and the evidence showed that during all these years said Willis lived at Bangor, where the deceased also lived until within a few months before the killing. It was in evidence, also, that said Willis had had a difficulty with the deceased, for which he had been prosecuted by the deceased, and convicted on the trial, several years before the killing; that said Willis McAnally was a son of said James McAnally, another one of said defendants, and a brother of Louisa J. McAnally, who had prosecuted the deceased on a charge of bastardy in the year 1877, while said James McAnally had brought an action against the deceased for the seduction of his said daughter, which terminated adversely to the plaintiff therein in 1879." This evidence seems to have been admitted without objection. "In the further progress of the trial, during the examination in chief of said Thomas B. McAnally, a witness for the State, said witness testified, in answer to a question by the solicitor, that he was present at a difficulty between the deceased and the three Mus-

[McAnally v. The State.]

groves here indicted, which took place at Bangor, about Christmas, 1879;" and the court allowed the witness to be examined, against the objection of the defendants, as to the particulars of this difficulty—who was armed, what was the cause of the difficulty, what was said and done, &c.; and to these rulings of the court exceptions were duly reserved by the defendants.

"The State offered evidence, also, tending to show that the three Musgroves named in this indictment were indicted by the grand jury of said county, together with Gordon Musgrove, for an assault upon the deceased; that said indictment was pending at the time the deceased was killed, and was tried after his death, resulting in the conviction of the three Musgroves here indicted; and that said indictment was for the same difficulty testified to by said Thos. B. McAnally. The State offered in evidence the record and proceedings in the Circuit Court of said county in a certain cause therein, wherein the State of Alabama was plaintiff, and said William H. Musgrove was defendant, under an indictment for perjury. Said prosecution was pending at the time the deceased was killed, and for several years prior thereto; and a trial was had at the Fall term of said court, 1881, resulting in a verdict of acquittal. The defendants objected to the admission of the record and proceedings aforesaid; the court overruled the objections, and allowed the evidence to be read to the jury; and to this action of the court the said defendants excepted, including the said Willis McAnally. In connection with the said record and proceedings, the State offered evidence to show that the deceased was a material witness for the prosecution, and was active in the prosecution; and to the admission of this evidence, against their objection, the said defendants duly excepted."

The court gave the following (with other) charges to the jury, on the request of the prosecuting officer: 3. "When a homicide has been committed, and the circumstances tend to show that the accused, or either of them was the perpetrator; then, the absence of any other guilty agent is a circumstance which may be weighed and considered, in connection with the other evidence, as evidence against the accused, upon the question whether they, or either of them, committed the homicide." 6. "If the jury believe that the circumstances of time, place, motive, means, opportunity and conduct of the defendants, concur in pointing them out as the perpetrators of the act charged in the indictment, the force of such circumstances is strengthened, if the evidence in the case shows the absence of any trace or vestige of another agent, with like motive, means and opportunity." 7. "It is essential to the proof of an *alibi*, that it should cover and account for the whole of the time of

[McAnally v. The State.]

the transaction in question, or at least for so much of it as to render it impossible that the defendants could have committed the imputed act." The defendants duly excepted to each of these charges.

JNO. W. INZER, GEO. H. PARKER, HAMILL & DICKINSON, and JNO. A. LUSK, for the appellant.—(1.) The statements of W. H. Musgrove, made in the afternoon of the day of the killing, had no connection whatever with that occurrence, and would not have been relevant evidence against him, if he had been on trial; and even if admissible against him, they were not competent evidence against McAnally and others, unless a conspiracy among them was first established. (2.) That there was no conspiracy is conclusively established by the verdict finding Willis McAnally alone guilty; and without proof of a conspiracy, the acts and declarations of the other defendants were not competent evidence against him.—1 Greenl. Ev. § 111; *Martin & Flinn v. The State*, 28 Ala. 71; *Johnson v. The State*, 29 Ala. 62. (3.) The court erred in permitting the prosecution to go into an investigation of the merits or particulars of the former difficulty between the deceased and some of the defendants.—*Gray v. The State*, 63 Ala. 66; *Commander v. The State*, 60 Ala. 1; *Faire v. The State*, 58 Ala. 74; *Mundin v. Bailey*, 70 Ala. 63. (4.) Evidence of another distinct, substantive offense, is not admissible.—*Gussenheimer v. The State*, 52 Ala. 314. (5.) That the third charge ought not to have been given, see *Boddie v. The State*, 52 Ala. 322; *Thompson v. The State*, 47 Ala. 37; *Corbett v. The State*, 31 Ala. 329; *Davidson v. The State*, 63 Ala. 432; *Childs v. The State*, 58 Ala. 349. (6.) On the facts disclosed by the record, the sixth charge is erroneous.—*Childs v. The State*, 58 Ala. 349; *Hull v. The State*, 40 Ala. 698. (7.) The measure of proof necessary to establish an *alibi*, as stated in the seventh charge, is too exacting, especially as applied to the facts of this case.—*Com. v. Choate*, 105 Mass. 459; *Com. v. Webster*, 5 Cush. 295; *State v. Hardin*, 46 Iowa, 623; *State v. Hamilton*, 57 Iowa, 596.

H. C. TOMPKINS, Attorney-General, for the State.—(1.) Whether or not there was a conspiracy, or community of purpose among the several defendants, was a question of fact to be determined by the jury; and evidence having been introduced tending to establish such conspiracy, the acts and declarations of each party, in furtherance of the common purpose, are competent evidence against all.—*Johnson v. The State*, 29 Ala. 62; *Scott v. The State*, 30 Ala. 503; Whart. Crim. Ev. § 698; *Wendover v. Robbins*, 30 Vermont, 4; 7 Ohio St. 476. (2.) It was permissible to prove, not only the

[McAnally v. The State.]

fact that the parties had had a previous difficulty, but the general circumstances thereof, and the acts of the several parties, so far as they might tend to show the feeling between the deceased and any of the defendants.—*Gray v. The State*, 63 Ala 66. (3.) An *alibi*, as a defense in a criminal case, rests on the self-evident truth, that a person can not be in two places at one and the same time; and the sufficiency of the evidence to establish such defense, in any given case, depends upon its fully covering and accounting for the defendant's presence at another place, during such a period of time as would render it physically impossible that he could have been at the place where the crime was committed, at the time it was committed. This is the proposition asserted by the seventh charge, and it neither shifts the burden of proof, nor infringes the rule as to a reasonable doubt.—*Burrill's Cir. Ev.* 511-14; *Creed v. People*, 81 Illinois, 565; *Briceland v. Com.*, 2 Green's Crim. R. 523.

STONE, J.—In charges of crime which, in their nature, may be perpetrated by more than one guilty participant, if there be a previously formed purpose or conspiracy to commit the offense, then the acts, declarations and conduct of each conspirator, done or expressed in promotion of, or in relation to the object or purpose of such conspiracy, become the act, declaration, or conduct of each co-conspirator, and may be given in evidence against him. But, to allow such testimony to go to the jury, a foundation must be laid by proof sufficient, in the opinion of the judge presiding, to establish, *prima facie*, the existence of such conspiracy.—1 Greenl. Ev. § 111; Whar. Cr. Ev. § 698; Stephens' Dig. Ev. 46; *Browning v. State*, 30 Miss. 656. But, when such testimony is received under this rule, it does not necessarily establish the conspiracy and common guilt of those not actively participating in the criminal act. The question, whether sufficient to establish the common guilt, is one for ultimate decision by the jury.

The present record states that it contains all the evidence, and it fails to show a *prima facie* case of conspiracy between any two of the parties indicted, to take the life of deceased, or do him other injury. The most it tended to show was, that two or more of them had malice against him, probably for alleged differing reasons. The Circuit Court erred in admitting evidence of acts or declarations, or prosecutions, of parties not on trial. This ruling does not exclude evidence of malice, or motive on the part of appellant, to commit the alleged crime, if there be such evidence.

It is not necessary we should consider the irregularity of
VOL. LXXIV.

[McAnally v. The State.]

summoning more jurors than the statute allows.—Code of 1876, § 4874. That question will not probably arise again.

An attempt was made to prove an *alibi*, in the trial of this cause. The charge No. 7, asked by the solicitor, and given by the court, can not be maintained. It asserts, that it is essential to the sufficiency of such defense, that it cover and account for so much of the time of the transaction in question as to render it impossible the prisoner could have committed the imputed act. This lays down too exacting a rule. The testimony in this cause shows, that the deceased came to his death by a gun-shot wound, fired at short range. Whoever did the fatal deed, was in close proximity to the deceased. Without it, he could not, and did not fire the shot. In the absence of conspiracy shown between the defendant and another, to take Hanna's life, followed by the homicide at the hands of that other, then the defendant can not be guilty, unless, *at the time*, he was near enough to do the deed. Proximity—opportunity—is a necessary, indispensable condition of his guilt. It is not necessary that the prosecution should, in the first instance, prove such proximity, if the testimony is otherwise sufficient. But, opportunity being an indispensable factor in the proof of defendant's guilt, if, on the whole testimony, this be left in reasonable doubt, then defendant's guilt is not established beyond a reasonable doubt.—Whar. Cr. Ev. § 333; *French v. The State*, 12 Ind. 670; *Kaufman v. The State*, 49 Ind. 248; *Howard v. The State*, 50 Ind. 190; *Line v. State*, 51 Ind. 172; *Miller v. People*, 39 Ill. 457; *Otmer v. People*, 76 Ill. 149; *Stuart v. People*, 42 Mich. 255; *Com. v. Choate*, 105 Mass. 451; *State v. Waterman*, 1 Nev. 543; *Pollard v. State*, 53 Miss. 410; *Chappel v. State*, 7 Cold. (Tenn.) 92.

In the state of the proof shown in this record, after excluding, as we have done, the acts and declarations of others not on trial, the facts do not present a case in which charge No. 6, asked for the prosecution, should have been given.—*Childs v. The State*, 58 Ala. 349. Charge 3 is, perhaps, subject to criticism, in view of the testimony found in this record.

The proof in reference to a previous difficulty was only admissible as tending to show malice, or a motive for doing the deed. In such case, it is the fact of such difficulty, and its gravity, or the contrary, which may be proven. Its merits, or the particulars, can not be given in evidence. If they were, the tendency would be to divert the minds of the jurors from the issue they are impanelled to try, to the merits of the former quarrel. Too much latitude was allowed in this case. Nothing should have been received, which tends to show who was in fault in the former difficulty.—*Gray v. State*, 63 Ala. 66; Clark's Cr. Dig. § 375.

[Williams v. The State.]

The judgment of the Circuit Court is reversed, and the cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

Williams v. The State.

Indictment for Murder.

1. *Statement by defendant.*—The “statement as to the facts,” which the accused is permitted to make in his own behalf (Sess. Acts 1882-83, pp. 3-4), though not under oath, is in the nature of evidence, and should not be capriciously rejected by the jury, “though they may discard it as unworthy of belief, especially when it is in irreconcilable conflict with the testimony of disinterested witnesses under oath;” but the court has no power to disregard it, and is bound to consider its evidential tendencies in subsequent rulings on evidence.

2. *Bad character of deceased; when admissible as evidence.*—When there is evidence tending to establish that the defendant acted in self-defense, the character of the deceased as a turbulent, violent, and blood-thirsty man, is relevant and admissible evidence for him.

3. *Explanatory charges.*—When charges given announce correct principles of law, though “some of them are abstract and misleading, because not strictly relevant to the peculiar phases of the evidence, their misleading tendencies should have been corrected by counter charges requested by the defendant,” and they present no reversible error.

FROM the Circuit Court of Butler.

Tried before the HON. JNO. P. HUBBARD.

The defendant in this case, Wesley Williams, was indicted for the murder of Walton McHenry, “by striking him with a rock, or with a stone, or with a brick-bat;” was tried on issue joined on the plea of not guilty; was convicted of murder in the second degree, and sentenced to the penitentiary for the term of sixteen years. On the trial, as the bill of exceptions shows, the State introduced several witnesses who testified to the circumstances of the killing, substantially as follows: The deceased and the defendant, with several other persons, were together at the store of one Davis in said county, on Christmas day, 1883, and were drinking, when they began “playing and knocking each other,” as one of the witnesses expressed it. The deceased had an open knife in his hand, and as he threw up his arm to ward off a blow aimed at his head by the defendant, he cut the defendant in the fore-arm. “Defendant then said he would kill the deceased, and went and got a rail,” which was taken away from him by some of the by-standers, while one of the others walked off with the deceased, towards

[Williams v. The State.]

his house. When the defendant was turned loose, he followed them, running, and overtook them, having picked up a rock, which weighed two or three pounds; and while the man who was with the deceased was talking with him, just as the deceased turned away, he struck the deceased on the head with the rock, killing him in a few minutes. These witnesses stated that, after the cutting at the store, the deceased proposed to make friends with the defendant, "and made no demonstration or movement towards attacking the defendant;" and it was proved that they had been friendly up to that time. One of the witnesses for the State, however, stated that the deceased was lying on a bale of cotton near the store, "and called the defendant to him; that when the defendant got near, the deceased cut at him with his knife, but defendant jumped back; that the deceased again raked at him with the knife, and cut him in the arm; and that he (witness) then told defendant to go off, and he went up the road a piece." The defendant then proposed to prove by this witness, on cross-examination, "that he knew the general character of the deceased, in the neighborhood in which he lived, and it was that of a turbulent, blood-thirsty, and violent man." The court excluded this evidence, and the defendant excepted to its rejection. "The defendant then made his statement, which was, that when he went to Davis' store, on Christmas morning, the deceased was lying on a bale of cotton, and called him up to him; that when he got up to him, the deceased cut at him with a knife, and cut his coat and shirt in the breast; that he jumped back, and the deceased again cut at him with the knife, and cut him on the arm; that he again jumped back, and Josh. Gilmore took the deceased away; that the deceased, after he got a short distance off, called to him to come where he was; that he went, but would not have gone if the deceased had not called him; that when he got up to the deceased, the deceased cut at him, and he (defendant) then hit him with the rock, which he had picked up to keep the deceased from cutting him, and killed him; and he had no intention of killing the deceased at the time." The marks on his arm, and the cuts in the coat and shirt, were exhibited to the jury. The defendant again proposed to prove the general character of the deceased "as a turbulent, blood-thirsty and violent man," and excepted to the ruling of the court in excluding the evidence. Several exceptions were also reserved to portions of the general charge given by the court, and to the refusal of several charges asked; but it is not necessary to state these charges.

GAMBLE & RICHARDSON, for the appellant.

[Williams v. The State.]

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The statutes of this State provide, that defendants, in criminal cases, may “make a statement *as to the facts*, in their own behalf, but not under oath.”—Acts 1883–83, pp. 3–4. We have had occasion several times to construe this law, and have said that this statement, thus authorized to be made by any defendant, was “in the nature of evidence,” and was subject to such intrinsic tests of credibility as ordinarily govern the sworn testimony of witnesses. It is settled, that the weight to which it is entitled by the jury, in reaching their verdict, is that which they see fit to accord it, in reason, justice, and conscience. It should not be capriciously rejected by them, without reason, notwithstanding the many inherent elements of weakness which so seriously affect its weight and credibility. Yet, for good and sufficient reasons, they may discard it as entirely unworthy of belief, especially when it is in irreconcilable conflict with the testimony of disinterested and impartial witnesses, who depose under the sanction of an oath.—*Blackburn v. The State*, 71 Ala. 319; *Chappell v. The State*, *Id.* 322; *Beasley v. The State*, *Id.* 328.

The statement made by the defendant upon the trial of this cause appears to be in direct conflict with the testimony of several witnesses who were examined, as to the circumstances of the alleged killing of the deceased by him. It was competent for the jury to discredit such statement, on this account, if they saw fit. The court, however, was not at liberty to do so, but should have considered its evidential tendencies, as a statement of alleged facts, in all rulings upon the introduction of evidence offered subsequent to the making of the statement, or in connection with it. The *tendency* of this statement, however incredible the jury may have believed it to be, was to establish a case of self-defense on the part of the prisoner. If the jury had believed it, they might have acquitted the defendant, upon the theory of an excusable homicide. In this aspect of the case, it was error for the court to exclude the evidence offered as to the bad character of the deceased as “a turbulent, blood-thirsty, and violent man,” at least when offered the second time, as it was, subsequent to, and in connection with the statement of the defendant.—*Johnson v. The State*, at present term; *Roberts v. The State*, 68 Ala. 156; *Id.* 515; *Storey v. The State*, 71 Ala. 329; *De Arman v. The State*, *Id.* 351; *Stokes' case*, 53 N. Y. 164; Cases Self-Defense (How. & Thomp.), pp. 486, 667, 641.

For the above error, the judgment of the Circuit Court must necessarily be reversed.

We have examined the charges given by the court, and those

[Wills v. The State.]

refused to be given at the request of the defendant, and discover in these rulings no error for which the judgment is reversible. The charges given announce correct principles of law. If some of them are abstract and misleading, because not strictly relevant to the peculiar phases of the evidence, their misleading tendencies should have been corrected by counter charges requested by the defendant. The charges requested by the defendant, and shown to have been refused by the court, were all subject to obvious objections, which have so often been considered by us as not to require discussion.

The judgment is reversed, and the cause remanded for a new trial. In the mean while, the defendant will be retained in custody, until discharged by due process of law.

Wills v. The State.

Indictment for Murder.

1. *Impeaching witness by proof of former statements.*—When it is sought to impeach a witness by showing discrepancies between his testimony and his former statements on the preliminary investigation before a committing magistrate, which were reduced to writing by the magistrate, and, for this purpose, he is cross-examined as to such former statements, it is not proper to read detached portions of them, and ask the witness if he did not so testify, but his entire testimony should be shown or read to him.

2. *Same.*—The witness having been cross-examined as to his former statements, with a view of impeaching him, his entire testimony on that examination may be read to the jury in rebuttal; not as original evidence, but only for the purpose of enabling the jury to compare the two statements, and see how far they are consistent or inconsistent with each other.

3. *Evidence admissible for one purpose only; explanatory charge.* When evidence is admitted which is competent for one purpose, if the party against whom it is admitted fears injury from its consideration for any other purpose, he should ask a charge limiting its operation.

4. *Dying declarations.*—Dying declarations are admissible as evidence, when made under a sense of impending dissolution, although the declarant may have never expressed the conviction that he must die.

5. *Homicide with deadly weapon, by blow voluntarily given, but not aimed at person killed.*—If a blow be voluntarily or intentionally given with a deadly weapon, not in self-defense, nor under other legal excuse, and death result from the blow, “the offense can not be less than manslaughter in the first degree, and may be murder,” even though the blow was not aimed at the person who was killed.

6. *Charge requiring explanation.*—A charge asked which, without explanation, tends to confuse or mislead the jury, is properly refused.

FROM the Circuit Court of Talladega.
Tried before the Hon. LEROY F. BOX.

[Wills v. The State.]

The indictment in this case charged, in a single count, that Randall Wills and Jane Wills, "unlawfully and with malice aforethought, killed Lucy Coleman by shooting her with a pistol." The defendants were jointly tried, and each pleaded not guilty; and by the verdict of the jury, Randall Wills was convicted of manslaughter in the first degree, and sentenced to the penitentiary for four years, while Jane Wills was acquitted. It appeared from the testimony adduced on the trial, that the defendants were living together as husband and wife, and the deceased was the wife of Jess. Coleman; that the parties were all colored persons, lived in the same inclosure, but in two different houses, and cultivated different patches of cotton in the same field; that the parties had an altercation one evening in September, 1881, which was caused by Jane Wills turning Coleman's calf out of the field, and resulted in the shooting of both Lucy and Jess. Coleman by a pistol in the hands of Randall. Only the four persons named were present at the shooting, and Jess. Coleman, a witness for the State, thus testified in reference to it: "Lucy and I were in the field picking cotton, after dinner, September 27, 1881, and started to hunt our calf that had been turned out. When we got to the top of the hill coming towards our house, we saw Randall and Jane picking cotton in their patch. I called to Jane, and asked her if she had turned my calf out. She answered, '*Yes, you son of a b—, I did turn it out.*' I then told her, '*It was a mean trick,*' and then heard Randall say, '*Hush, Jane.*' This was all that was said there, and Lucy and I went on towards the house. Randall went to his house, and got a pistol, and came back, and met me in the road, and shot me. After he fired the first shot, he *hollered* to Jane to catch and hold me—that *G— d— me, he was going to kill me.* I then struck him on the head with a rock, and he then fired the second shot, which struck my wife. He fired four shots in all; the first struck me in the side, the second struck my wife, and the other two struck me on the arm and hand."

Dr. Donaldson, a practicing physician, was examined as a witness for the State, and thus testified: "I saw Lucy Coleman late in the afternoon of the day she was shot, and examined her. She was shot in the abdomen, and died the next day from the effects of the shot. I told her that she could not recover, and that she had better arrange such things as she wished to arrange as soon as possible, as she could not live long. She made no reply to me. A good many persons were present, and among them Squire E. C. Turner, who was near her bed when I told her she could not get well." Said Turner afterwards testified as follows: "I was a justice of the peace in said county in September, 1881, and am now; and in that capacity I went to

[Wills v. The State.]

see Lucy Coleman after she was shot. Dr. Donaldson and others were there. I did not hear all that he said to Lucy, but, after stating to her that Dr. Donaldson said she could not live, I examined her on oath about the difficulty; and what she said was reduced to writing in her presence, under my directions, by Mr. Burns." The written statement being produced, and identified by the witness, "the State offered the following portions of said statement, as the dying declarations of the deceased: *'As Jess. Coleman, my husband, and myself were returning from the cotton-patch, he commenced firing on Jess. and me, and at the same time cursing us. I walked some distance, and fell from the effects of the pistol shot.'* The defendant objected to this testimony, on the ground that no sufficient predicate for its introduction had been offered; but the court overruled the objection, and the defendant excepted." This was all the evidence offered in relation to the dying declarations of the deceased.

Jane Wills was arrested the day after the shooting, but Randall was not arrested for several days afterwards. On the preliminary investigation of the charge against Jane, before said E. C. Turner as a justice of the peace, the witnesses for the prosecution were examined, and their testimony was reduced to writing by the magistrate, or under his directions, and was sworn to and subscribed by the several witnesses. When these witnesses were examined on the trial, the defendant sought to impeach their testimony, by showing discrepancies between it and their former statements on the preliminary investigation; and he reserved several exceptions to the rulings of the court in reference to this evidence. The substance of these rulings is stated in the opinion of the court.

The defendant requested the following charges, each of which was in writing, and was refused by the court: 1. "Manslaughter in the first degree is not merely the voluntary or intentional killing of a human being, but is the unlawful and intentional killing of a human being; and unless the evidence shows, beyond all reasonable doubt, that the defendant unlawfully and intentionally killed Lucy Coleman, the jury can not convict him of that offense." 2. "Unless the jury find from the evidence, beyond all reasonable doubt, that the defendant voluntarily and intentionally took the life of Lucy Coleman, they must acquit him." 3. "If the defendant went to his house, and got his pistol, and returned with it, to protect his wife from Coleman; and that then he, not being in fault, was assaulted by Coleman with a rock, and struck on the head; and if then, to save himself or his wife from great bodily harm, he fired the pistol at Jess. Coleman, and accidentally struck and killed Lucy Coleman, he is not guilty of any offense." 4. "Even though the

[Wills v. The State.]

defendant may have intended to kill Jess. Coleman, if he, in attempting to do this, accidentally killed Lucy Coleman, he can not be convicted of voluntarily killing Lucy Coleman, and is not guilty of manslaughter in the first degree, unless he would have been guilty of the same offense if Jess. Coleman had been shot." The defendant duly excepted to the refusal of these charges, and also to the following charge, which was given at the instance of the prosecuting officer: "Whether or not there is evidence showing a case of self-defense, or a case of killing under a sufficient provocation to justify it, the jury must determine from all the evidence; and if the jury find that Randall did not shoot in self-defense, but got his pistol for the purpose of killing Jess. Coleman or his wife, and advanced on them, and shot at either of them with intent to kill, and actually did kill Lucy Coleman, then the jury must find the defendant guilty of manslaughter in the first degree, if the killing was in this county, and before the finding of this indictment; and if the evidence shows circumstances of aggravation, the jury may, in their discretion, sentence the defendant to ten years imprisonment in the penitentiary."

All these rulings of the court are now relied on as error.

PARSONS & PARSONS, for appellant.

H. C. TOMPKINS, Attorney-General, with HEFLIN, BOWDON & KNOX, *contra*.

STONE, J.—In the cross-examination of witnesses for the prosecution, the defense sought to impeach them, by introducing their written testimony taken down when they were examined as witnesses on the committing trial of Jane Wills, who was charged with participation in the homicide, for which her husband, Randall Wills, was on trial. In each examination, the testimony related to one and the same altercation; and the testimony on the committing trial of Jane was sworn to and subscribed by the respective witnesses. Counsel for the defense read to witnesses detached sentences of said written testimony, and asked them if they had not so testified on the committing trial. On objection and motion by counsel for the prosecution, the court ruled that the entire affidavits, or sworn testimony, should be shown, or, rather, read to the witnesses (they could not read), before the latter should be required to answer. In this the Circuit Court conformed to what we consider the true and sound rule on the subject. "A witness is not bound to answer as to matters reduced to writing by himself or another, and subscribed by him, until after the writing has been produced and read or shown to him."—*Newcomb v. Griswold*, 24 N. Y.

[Wills v. The State.]

29; *Bellinger v. People*, 8 Wend. 595; *Stephens v. People*, 19 N. Y. 549; *Morrison v. Myers*, 11 Iowa, 538; *Callahan v. Shaw*, 24 Iowa, 441; *Stamper v. Griffin*, 12 Georgia, 450; 1 Whar. Ev. § 68, and notes; 1 Greenl. Ev. § 463.

After the witnesses had been cross-examined as to the contents of the sworn testimony, with a view of showing discrepancy between it and the testimony then being given, there was no error in permitting the prosecuting attorney to read to the jury the entire written testimony of the witnesses, thus attempted to be discredited. It was but just that the whole connected statement should go before the jury, to enable that body to institute a comparison between the two statements. It was competent for no other purpose. If the defendant apprehended the jury would treat the affidavits as original and general evidence in the case, that was a subject for a charge, limiting its operation. To put the court in error, such charge must have been requested and refused.—1 Brick. Digest, 809, § 87; *Ib.* 810, § 98.

There is nothing in the other points raised as to the admissibility of evidence. The dying declarations of the deceased were clearly admissible.—*Kilgore v. The State*, at present term. The pre-requisite is, that they shall be made under a sense of impending dissolution. When this is shown, the testimony is properly admitted, although the declarant may never have expressed the conviction that he or she must die.

Charges 1 and 2 asked by defendant were rightly refused. If a blow be intentionally or voluntarily given, with a deadly weapon, and not in self-defense, or under other legal excuse, and the result be the death of a human being, even though not the person aimed at, this can not be less than manslaughter in the first degree, and may be murder. The depraved heart, or unlawful will, with which the instrument of death is hurled at one, accompanies and characterizes the fatal blow, which falls on another by misadventure.—Code of 1876, §§ 4295, 4300; *McManus v. The State*, 36 Ala. 285; *Judge v. The State*, 58 Ala. 406.

Charge 3 was rightly refused, because the record contains no evidence, either that defendant's wife needed protection from Coleman, or that defendant apprehended there was such need.

Charge No. 4 would assert a correct legal proposition, if the words, "*he can not be convicted of voluntarily killing Lucy Coleman*," had been omitted. We have shown above that a specific intention to kill Lucy Coleman, was not necessary to defendant's conviction of manslaughter in the first degree. The words copied and italicized above would tend at least to confuse and mislead the jury, and for that reason the charge was rightly

[Jackson v. The State.]

refused.—*Bay Shore R. R. v. Harris*, 67 Ala. 6; *Kirkland v. Trott*, 66 Ala. 417.

The charge given at the instance of the prosecution is free from error.

Let the judgment of the Circuit Court be affirmed, and the sentence of the law be executed.

Jackson v. The State.

Indictment for Murder.

1. *Competency of coroner as juror.*—A person filling the office of coroner may, as a personal privilege, claim exemption from service as a juror (Code, § 4734); but he may waive this privilege, and is not subject to challenge for cause on account of it.

2. *Indorsements on indictment; variance in spelling foreman's name.* When the record affirmatively shows that the indictment was returned into court, indorsed and filed, as required by the statute (Code, § 4821), a variance in the spelling of the foreman's name, as copied in the indorsements, is immaterial, when the names are strictly *idem sonans*.

3. *Misnomer, and variance.*—The names *Booth* and *Boothe* are strictly *idem sonans*.

4. *Objections to verity of indictment.*—Objections to the genuineness of an indictment as a court record must be raised in the court below, before pleading to the merits, by timely motion to quash, or to strike the paper from the files; and can not be raised, for the first time, in this court.

5. *Competency of juror opposed to capital punishment on circumstantial evidence.*—The statute making it good cause of challenge by the State, that a person "has a fixed opinion against capital punishment, or thinks that a conviction should not be had on circumstantial evidence" (Code, § 4883); a person who states, on his *voir dire*, that he is not opposed to a conviction on circumstantial evidence, but is opposed to punishing capitally on such evidence, is subject to challenge for cause, when the indictment charges a capital felony.

6. *General verdict, under indictment containing several counts.*—When an indictment contains two or more counts, each charging the commission of the same offense, but with different means or instruments, the jury are not bound to acquit, because they may entertain a reasonable doubt as to which of the means or instruments was used; nor can they be required, by instructions on the part of the court, to specify in their verdict the particular count on which it is founded. (Limiting *Givens v. The State*, 5 Ala. 747, to cases in which different offenses are charged in the several counts, and in which the prosecution might be compelled to elect.)

7. *Malice.*—Malice, whether express or implied, is not an ingredient of manslaughter; and whenever it is established to the satisfaction of the jury, beyond a reasonable doubt, there can be no conviction of any less offense than murder.

8. *Charge as to manslaughter.*—A charge requested which, admitting the killing with a deadly weapon, ignores the question of malice, and instructs the jury that they can not convict of a higher offense than manslaughter, is properly refused.

[Jackson v. The State.]

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The defendant in this case, George Jackson, was indicted for the murder of Adam Howard, "by striking him with a gun," or, as alleged in the second count of the indictment, "by cutting him with a razor;" and being duly arraigned, and tried on issue joined on the plea of not guilty, he was convicted of manslaughter in the first degree, and sentenced to the penitentiary for the term of ten years. On the trial, as the bill of exceptions states, during the organization of the jury, when the name of M. P. Blue was drawn and called, he being one of the special *venire* summoned for the trial, the defendant objected to his competency as a juror. "because he is the coroner of the county, and it is his duty to sit in judgment and inquire into just such cases as this." The court overruled the objection, and the defendant excepted. When the name of W. R. Noble was called, he being also one of the special *venire*, "in reply to the question, whether or not he thought a conviction should be had on circumstantial evidence," he answered: "I am opposed to hanging on circumstantial evidence, but am not opposed to a conviction on circumstantial evidence." The court thereupon ruled that said Noble was not a competent juror, and ordered him to stand aside; to which ruling and action of the court the defendant objected and excepted.

The evidence adduced on the trial, as set out in the bill of exceptions, showed that, on the day of the homicide, the deceased went into his own house, and, finding his wife in conversation with the defendant, got a razor out of his trunk, and cut the defendant several times with it; that the defendant ran from the house, pursued by the deceased, who threw a brick at him as he jumped the fence; that the defendant went to his own house, armed himself with a gun and razor, returned to the house of the deceased, and attempted to shoot him through the window; that the deceased, on seeing him, ran from the house, pursued by the defendant with several dogs, and, after running more than a quarter of a mile, took refuge in a swamp, where he was overtaken by the defendant, and killed, being "knocked down with the gun, and then cut in a great number of places with a razor." The evidence did not show the character of any of these wounds, nor was it shown which one produced death; and if there was any evidence as to these matters, it is not stated in the bill of exceptions. The defendant proved "that he had a good character for peace and good conduct."

The above being "substantially all the evidence," the court charged the jury, on the request of the solicitor, as follows: "When the killing is shown to have been done with a deadly

[Jackson v. The State.]

weapon, the law implies malice from the use of the weapon, and the burden of proof is on the defendant to rebut this presumption; unless the evidence showing the killing, itself shows there was no malice; and whenever malice is shown, either express or implied, there can be no conviction of any less offense than murder." The defendant excepted to this charge, and requested the following charges, which were in writing:

"1. If the jury have a reasonable doubt as to what killed Adam Howard,—whether it was by being struck with a gun, or by cuts with a razor,—then they can not convict the defendant of any offense under this indictment.

"2. If the jury are not satisfied from the evidence, beyond all reasonable doubt, as to how the defendant killed Adam Howard, and as to the manner of the killing,—whether it was done by striking him with a gun, or by cutting him with a razor,—then the jury must acquit the defendant under both counts in the indictment.

"3. Unless the jury believe from the evidence, beyond a reasonable doubt, that the defendant killed Adam Howard by striking him with a gun, they can not convict the defendant of any offense at all under the first count in the indictment; and unless they believe from the evidence, beyond all reasonable doubt, that the defendant killed Adam Howard by cutting him with a razor, they can not convict the defendant of any offense at all under the second count in the indictment.

"4. If the jury believe, from the evidence, that the difficulty between the defendant and the deceased started by the deceased cutting the defendant with a razor, while sitting quietly and inoffensively in the house of the deceased; and that the deceased pursued the defendant to his house, hurling a brick at him, and then returned to his own house; and that the defendant, immediately thereafter, came to the house of the deceased, with his gun and razor; and that the deceased ran, pursued by the defendant, with blood flowing from his arm; and that when the defendant caught up with the deceased, a fight was had between them, in which the deceased was killed; or, if they believe that the defendant killed the deceased under these circumstances,—then the jury can not find the defendant guilty of a higher offense than manslaughter in the first degree."

The court refused each of these charges, and the defendant duly excepted to their refusal.

The name of the foreman of the grand jury, as copied in the minute-entry of the organization of the jury, was *J. A. Booth*; and in the indorsement on the indictment, as copied in the transcript, the name is spelled *J. A. Boothe*. One of the assignments of error in this court was founded on this alleged variance; and the charge of the court, as well as the

[Jackson v. The State.]

refusal of the several charges asked, was also assigned as error.

WATTS & SON, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The fact that one offered as a juror fills at the time the office of *coroner* furnishes no lawful ground for challenge under the laws of this State. The statute does not disqualify him from serving as a juror, but only declares that he shall be “exempt from jury duty, unless by his own *consent*.”—Code, 1876, § 4734. This right of exemption is clearly a mere personal privilege, which may be claimed, or *waived* by him, at his option.—*Spigener's case*, 62 Ala. 383. The City Court so ruled, and its action is free from all objection.

The fact is sufficiently patent from the record, that the indictment found by the grand jury was one of the number returned by them to the October term, 1883, of the City Court of Montgomery. This indictment is shown to have been indorsed “a true bill,” by the foreman of this body, and was also indorsed by the clerk of the court as “presented in open court,” in presence of the other members of the grand jury, and “filed” on the 20th day of October, 1883. This indorsement was furthermore signed by the clerk. The requirements of the statute were thus literally complied with, beyond all question of doubt.—Code, § 4821; *Wesley's case*, 52 Ala. 182.

The variance in the spelling of the foreman's name was entirely immaterial. His true name, as shown by the record, appears to be *J. A. Booth*. As indorsed upon the indictment, it is spelled *J. A. Boothe*. The two names are strictly *idem sonans*, and must be construed to be legally the same.—*Stedman's case*, 7 Port. 496.

Moreover, objections of the foregoing character, going to the *genuineness* of an indictment as a court record, can not be interposed in this court for the first time. They should be raised in the court below, before pleading to the merits of the case, by timely motion to quash, or to strike the paper from the files. This course is not shown to have been pursued. *Sparrenberger's case*, 53 Ala. 481; *Clark's case*, 3 Ala. 378; *Nixon's case*, 68 Ala. 535.

The court did not err, in our opinion, in holding the juror Noble to be incompetent to serve, under the provisions of the statute. Section 4883 of the present Code declares it to be a good cause of challenge by the State, in capital cases, that the person “has a fixed opinion against *capital*, or penitentiary punishment,” or “thinks that a conviction should not be had

[Jackson v. The State.]

on *circumstantial evidence*." Noble declared, when examined on his *voir dire*, that while he was not opposed to a *conviction* on circumstantial evidence, he was opposed to *hanging*, or punishing capitally, on such evidence. He had, in other words, a fixed opinion against capital punishment, as prescribed by the laws of this State, based on circumstantial evidence. This was sufficient to disqualify him under the statute, the policy of which is to place positive and circumstantial evidence upon the same basis of equality, so as to abolish all prejudice or discrimination against them, as media or instrumentalities for arriving at the truth, in the process of judicial investigation of capital felonies against the State.

It is insisted that the court below erred in refusing to give the several charges requested by the defendant, the purpose of which was to compel the jury to elect under which count of the indictment they would find a verdict of guilty. The first of these counts averred the killing to have been done by striking with a *gun*, and the second by cutting with a *razor*. It is our opinion that these charges, according to the sounder view, were properly refused. The purpose of joining the two counts, as shown by the evidence, is not to charge two separate and distinct offenses, but to vary the description of one and the same offense. The theory of the law, in permitting several counts in such cases, is to meet every probable contingency of the evidence. Under such a state of facts, the State can not be compelled to elect under which particular count it will conduct the prosecution. Neither can the jury any more be forced, by instructions of the court, to elect under which count they will convict. They may well be satisfied, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, and yet may entertain serious doubts as to the mode of death, or the instrument by which the mortal wound was inflicted. It would result in a lamentable maladministration of justice, if the principle should obtain, that the defendant should be acquitted of murder, or other homicide, because the jury entertained doubts as to the kind of instrument used in perpetrating the killing, although they might be sure it was done with one of two instruments, and each mode of killing was properly described in the indictment. If the grand jury were not satisfied as to the mode of death, it was competent for them to charge the crime in several counts, or in the same count, so as to meet every possible contingency of the evidence on this point; and neither the State, in the first instance, nor the jury, in the progress of the trial, could be compelled to elect under which particular count a conviction should be had or procured.—1 Whart. Cr. Law, §§ 421, 423-424; Whart. Hom. §§ 819, 857, 906; *Com. v. Desmarteau*, 16 Gray, 1.

[White v. The State.]

It was said in *The State v. Givens*, 5 Ala. 747, that the jury should be instructed, at the request of the defendant, to express by their verdict on which count they render their verdict of guilty. The rule there declared is erroneous, when applied to cases like the present, where the several counts in the indictment are intended to vary the description of the same offense. It must be modified, so as to be limited to those cases only where the doctrine of election applies, or where the various counts of the indictment are intended to describe offenses which are separate and distinct.—1 Bish. Cr. Prac. § 449, note (3).

We see no error in the charge given at the request of the State. *Malice*, either express or implied, is often said to be the very essence of murder, and can not be an ingredient of manslaughter. There could, therefore, be no conviction of any less offense than murder, if the existence of malice, or, as more commonly designated “malice aforethought,” was proved to the satisfaction of the jury, and beyond a reasonable doubt. Whart. on Hom. § 4; 4 Black. Com. 191; Clark’s Man. Cr. Law, §§ 412, 419; 2 Bish. Cr. Law, §§ 677, 672.

The fourth charge, requested by the defendant, was properly refused. The charge, in effect, instructs the jury, that upon the given state of facts, which admit the killing with a deadly weapon, they could not convict the defendant of a higher grade of homicide than manslaughter, without any regard to the existence of malice. The charge is defective, in withdrawing from the jury all consideration of the question of malice, which itself determined the degree of the crime.

We find no error in the record, and the judgment is affirmed.

White v. The State.

Indictment for Living in Adultery or Fornication.

1. *Motion to quash indictment.*—A motion to quash an indictment is, generally, addressed to the sound discretion of the court, and its refusal is not revisable on error or appeal; and if there be exceptions to this general rule, the record in this case does not present one, the motion to quash being founded on the failure of the clerk to mark the indictment filed, as ordered by the court.

2. *General verdict, under indictment charging offense in alternative.* Where the indictment charges the offense in the alternative—as, living in adultery or fornication—the jury can not be required, by instructions on the part of the court, to specify in their verdict the alternative on which it is founded.

[White v. The State.]

3. *Adultery; constituents of offense.*—To authorize a conviction for living in adultery, it is not necessary that both of the parties should be married.

4. *Same; proof of defendant's sex.*—In determining the sex of the defendant, he being personally present in court, the jury may look at his dress and general appearance, in connection with all the evidence in the case; and the court may properly instruct them to that effect, when requested to charge that they "can only look to the sworn statements of the witnesses in determining whether the defendant is a man."

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JAS. E. COBB.

The indictment in this case, which was found at the Spring term, 1883, charged, "that John White, a white man, and Emma Danby, a negro woman, did live together in a state of adultery or fornication." A *nolle pros.* was entered as to the woman; and the defendant White, "before pleading to the indictment," as the bill of exceptions states, "moved the court to quash said indictment, because it was not indorsed *filed*, and because it did not appear that the same was returned into open court by the foreman of the grand jury, as required by law, and filed by the clerk as required by law. Thereupon, before passing on this motion, the court heard evidence touching the matter in issue; and it was proved by the sworn statements of the clerk of the court, and the clerk of the grand jury by whom the indictment purports to have been found, that at the last term of this court, when said indictment purports to have been found, said indictment was then found by the grand jury sitting for said county, and presented to the presiding judge, in open court, by the foreman of the grand jury, in the presence of at least fifteen other grand jurors, and was handed by the presiding judge, in open court, and in the presence of said grand jurors, to the clerk of the court, with orders to file the same; that the said indictment has been held by the clerk ever since he so received it, with other indictments in his office, and that he failed by an oversight to mark the same filed. On this proof being made, the court ordered the clerk to mark the indictment as filed at the last term, and, said indorsement being made, then overruled the defendant's motion to quash;" to which action and ruling of the court, both in receiving said evidence, and in overruling said motion, the defendant duly excepted.

The defendant then pleaded not guilty, and issue was joined on that plea. "On the trial," as the bill of exceptions states, "the evidence showed that, before and during the time when, as the evidence tended to show, the defendant and said Emma lived together, the defendant was a married man, and the said Emma was an unmarried woman; and that he was still a married man, and she an unmarried woman. The defendant asked the court, in writing, to charge the jury as follows:" 1. "The

[White v. The State.]

jury can only look at the sworn statements of the witnesses, in determining whether the defendant is a man; and if the jury are not satisfied, from the sworn statements of all the witnesses examined in the cause, they must find the defendant not guilty." The court refused to give this charge, and instructed them "that the jury could look at the defendant, in connection with all the evidence in the case, to determine whether the sex of the defendant was male or female." To the refusal of the charge asked, and to the charge thus given, the defendant excepted.

The defendant also asked the following charges, which were in writing: 2. "The jury must be satisfied from the evidence, beyond all reasonable doubt, that both John White and Emma Danby were unmarried persons at the time of the alleged offense, before they can convict the defendant of fornication." 3. "Before the defendant can be convicted of living in adultery or fornication with Emma Danby, the proof must show, beyond all reasonable doubt, that one of the parties was a married man and the other a married woman, or that one was an unmarried man and the other an unmarried woman." 4. "It devolves upon the State to produce evidence sufficient to satisfy the jury, beyond all reasonable doubt, whether the defendant was, at the time of the alleged offense, a married or an unmarried man; and unless the State has done so, the jury must find the defendant not guilty." 5. "The jury must be satisfied from the evidence, beyond all reasonable doubt, which relation the defendant was in at the time of the alleged offense, that of a married person or an unmarried person." 6. "Before the jury can convict the defendant of living in a state of adultery with Emma Danby, the proof must show beyond all reasonable doubt that one of the parties was a married man and the other a married woman." The court refused each of these charges, and the defendant duly excepted to their refusal.

II. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—1. There was no error in the action of the Circuit Court in refusing to quash the indictment upon the motion of the appellant. The entertaining of a motion to quash is, as a general rule, in the sound discretion of the lower court, and not revisable by this court on appeal.—*State v. Jones*, 5 Ala. 666. In *Nixon v. State*, 68 Ala. 535, it was left undecided by the court, whether or not there might be cases in which a refusal to quash an indictment upon motion would be revisable; but we are clearly of opinion that the present is not such a case.

2. The second, third, fourth and fifth charges requested by the appellant, were properly refused by the court. The effect

[Peterson v. The State.]

of these charges would have been, to compel the jury to make a special finding as to which of the two offenses, adultery or fornication, they elected to convict the defendant.—*Kilgore v. State*, and *Jackson v. State*, at present term; *ante*, pp. 1, 26.

3. The sixth charge requested by the appellant was properly refused. It states the erroneous proposition, that for either of the parties to be guilty of adultery, both must be married. Adultery is "the illicit intercourse of two persons of different sexes, where either is married."—Clark's Crim. Law, § 1544; *Hinton v. State*, 6 Ala. 864..

4. The first charge requested by the appellant is as follows: "The jury can only look to the sworn statements of the witnesses, in determining whether the defendant is a man; and if the jury are not satisfied from the sworn statements of all the witnesses examined in this case, they must find the defendant not guilty." The court refused to give the charge, but instructed the jury, that they "could look at the defendant, in connection with all the evidence in the case, in determining whether the sex of the defendant was male or female." We are of opinion that there was no error in this action of the Circuit Court. The defendant was present in court; and it was clearly competent for the jury to draw the inference from his dress and general appearance that he was of the male sex. This species of evidence is said by Mr. Wharton to be one of the "most effective modes of conviction."—Wharton's Crim. Ev. §§ 311 *et seq.*

We find no error in the record, and the judgment must be affirmed.

Peterson v. The State.

Indictment for Perjury.

1. *Sufficiency of indictment.*—An indictment for perjury committed on a trial for a felony, which follows the statutory form (Code, § 4813; Form No. 41, p. 995), is sufficient.

2. *Sufficiency and relevancy of evidence.*—To authorize a conviction for perjury, there must be two witnesses, or one witness with strong corroboration; and when the perjury charged consists of alleged false testimony given under oath as a witness on a trial for perjury, while it is competent for the prosecution to prove contradictory statements, as to the same facts, made by the defendant when examined as a witness before the grand jury, a conviction can not be had on proof of these former statements, unless their truth is substantiated by other evidence.

3. *Requisites of charges to jury.*—Charges asked should be "clear and

[Peterson v. The State.]

explicit, easy of interpretation, and not liable to mislead;" and when wanting in these requisites, they may properly be refused.

4. *Oath of petit jury*.—A recital in the judgment-entry that the jury was "duly sworn," or "sworn according to law," without more, is sufficient; but, where the recital is that the jury was "sworn and charged well and truly to try the issue joined," without more, this does not show a substantial compliance with the statutory oath (Code, § 4765), and the error will work a reversal of the judgment.

FROM the Circuit Court of Butler.

Tried before the Hon. JNO. P. HUBBARD.

The indictment in this case charged, in a single count, that, before the finding thereof, "Josh Peterson, on his examination as a witness, duly sworn to testify, on the trial of one Jane Cauthen in the Circuit Court of Butler county, under an indictment charging that Thomas Norris, a negro man, and Jane Cauthen, *alias* Jane Cauthorn, a white woman, did intermarry, or live in adultery or fornication with each other, which court had jurisdiction to administer such oath, falsely swore that he did not know any thing about any acts of adultery or fornication committed by the said Jane Cauthen and Thomas Norris; that he did not know any thing about their being married together; that he never saw any thing wrong between them; that he never saw the said Thomas Norris about the house where the said Jane lived, any more than other men; the matters so sworn to being material, and the testimony of the said Josh Peterson being willfully and corruptly false." No objection to the indictment was made in the court below, so far as the record shows, and the trial was had on issue joined on the plea of not guilty. On the trial, as the bill of exceptions shows, the State introduced several witnesses who testified as to the defendant's testimony on the trial of said Jane Cauthen and Thomas Norris in the Circuit Court, substantially as alleged in the indictment; and then introduced several members of the grand jury by whom the indictment against said Jane and Thomas was found, and who testified to inconsistent statements made by him, when examined as a witness before the grand jury. The defendant objected to the admission of this evidence as to his testimony before the grand jury, and reserved exceptions to the overruling of his several objections. The bill of exceptions purports to set out all the evidence, but it does not show that any evidence whatever was introduced as to the truth of the defendant's statements when examined as a witness before the grand jury; or any evidence as to the falsity of his testimony on the trial, except his former testimony before the grand jury.

The defendant requested the following charges to the jury: "1. If, in looking at the testimony in the case, including the testimony of the defendant before the grand jury and in the

[Peterson v. The State.]

Circuit Court, the jury are satisfied the outside circumstances and testimony tend as much, or more, to show that the testimony given by the defendant in the Circuit Court was correct, as it tends to show that the testimony given by him before the grand jury was correct, then the jury should acquit." 2. "There can not be a conviction of perjury, unless the evidence of two witnesses, or of one witness with strong corroborating circumstances, proves the falsity of the matter spoken and charged to be false; and the oath of the defendant before the grand jury is not sufficient for one of those witnesses." The court refused each of these charges, and the defendant excepted to their refusal.

GAMBLE & RICHARDSON, for the appellant, cited Wharton's Amer. Crim. Law, vol. 3, § 2275; Bishop's Crim. Law, vol. 2, § 1044; Roscoe's Crim. Ev., vol. 1, p. 834, mar.; Clark's Manual, § 1248.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The indictment in the present case charges the defendant with the commission of the felony denounced by section 4112 of the Code of 1876. It strictly pursues form 41, on page 995 of the Code, designed for this identical offense, and is sufficient.

The charge is, that the defendant, in giving his testimony on the trial of Thomas Norris and Jane Cauthen, in the Circuit Court, committed the alleged perjury. The witness had been examined before the grand jury in the same case, and it was sought to be shown that the testimony thus first given was true; that that given on the final trial was materially different, and that the latter was willfully and corruptly false. There was no count, or charge, based on his testimony before the grand jury. Hence, to obtain a conviction, it was necessary to convince the jury, by that measure of proof required in criminal cases, that on the trial in chief, and in a matter material to the issue, the defendant had testified to that which was willfully and corruptly false. There can be no conviction of the crime of perjury, on the unaided testimony of a single witness. This would be oath against oath. There must be two witnesses, or one with strong corroboration.—1 Greenl. Ev. § 257; Clark's Manual, § 1248. This corroboration, to be sufficient, must be of the very act—the *corpus delicti*—the giving of material testimony which is willfully and corruptly false. And when, as in this case, it is alleged the accused has made two sworn statements which are in irreconcilable conflict, if there is no strong corroboration of one of the versions, how

[Peterson v. The State.]

can it be affirmed the other is false? Previous contradictory statements, made with or without oath, may be very important evidence, in connection with other circumstances, against the accused; but, no matter by how many witnesses the different and conflicting statements may be proved, this is not corroborative proof of the *corpus delicti*. The offense charged is the willfully false denial of knowledge of certain criminating facts, against Norris and Cauthen. Corroboration should be of such a nature as would tend to prove the existence of such criminating facts, and the defendant's knowledge of their existence. This would tend to prove the alleged first testimony was true, and the latter false. This would be corroboration of the truth of the testimony of one witness—his alleged testimony before the grand jury; and if sufficiently strong and convincing, would authorize the jury to find the falsity of the second testimony, and to convict the defendant.—1 Greenl. Ev. § 259. Let it be remembered, we are dealing with an indictment, which charges perjury only in the testimony last given. The Circuit Court did not err in admitting testimony of what the defendant testified before the grand jury.

The charges asked were correctly refused. The first, while probably intending to embody the principle stated above, is so involved, as that it is difficult to understand it. Charges should be clear and explicit, easy of interpretation, and not liable to mislead.—*Hughes v. Anderson*, 68 Ala. 280; *Bay Shore R. R. Co. v. Harris*, 67 Ala. 6.

The last clause of charge 2 is not correct. There is no rule of law which declares, that a sworn statement of one charged with perjury, made at another time, different from his testimony which is charged to be willfully and corruptly false, and on which his conviction is sought, may not be given in evidence against the accused, as tending to sustain the charge made against him. By itself, as we have said, it is not sufficient; for it is only oath against oath, and, at most, would leave the mind in doubt which was the true, and which the false version. It is testimony, however—the testimony, either of one witness, or of corroboration—and it can not be affirmed, as matter of law, that it “is not sufficient for one of the witnesses.” Its sufficiency is a question for the jury, under proper instructions.

The oath of the jury in this case is precisely in the form which was held insufficient in *Storey's case*, 71 Ala. 329; and for that error, the judgment must be reversed. We have many times ruled, that it is sufficient if the judgment-entry affirms the jury was “duly sworn,” or “sworn according to law.” This is a very simple rule, and can be easily conformed to. Still, we find it often disregarded. It would seem some

[Bain v. The State.]

remedy ought to be devised for this, either by the legislature, or by a closer scrutiny of clerical work.

Reversed and remanded. Let the accused remain in custody, until duly discharged.

Bain v. The State.

Indictment for Murder.

1. *Charge as to sufficiency of evidence.*—In a criminal case, a charge requested, in these words, "A probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal," asserts a correct proposition, and its refusal is an error which will work a reversal of the judgment. (*Cohen v. The State*, 50 Ala. 108, is irreconcilable with *Williams v. The State*, 52 Ala. 411, but it asserts the correct rule.)

FROM the Circuit Court of Jackson, on change of venue from Marshall.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case charged the defendant, James M. Bain, with the murder of Bluford Johnson, by shooting him with a pistol. On a former trial, the defendant was found guilty of manslaughter in the first degree; but the judgment was reversed by this court, and the cause remanded.—See the report of the case in 70 Ala. 4-7. On a second trial, as shown by the present record, the defendant again pleaded not guilty; and issue being joined on that plea, he was again convicted of manslaughter in the first degree, and sentenced to the penitentiary for five years. During the trial, the defendant duly reserved exceptions to the refusal of numerous charges requested by him, and these matters are now urged as error; but the opinion of this court renders a statement of them unnecessary.

ROBINSON & BROWN, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The judgment in this cause must, in our opinion, be reversed, for the error committed in refusing the last charge, numbered eleven, which was requested by the defendant. This charge reads as follows: "A *probability of defendant's innocence* is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal."

[Hobbs v. The State.]

Our rulings on this point are not in harmony. The charge, as requested, was evidently taken from *Cohen's case*, 50 Ala. 108, where it was held to assert a correct proposition of law, and its refusal was decided to be error. In *Ray's case*, reported in the same volume (50 Ala. 104), a charge couched in the same language, but prefaced by the assertion, that "a reasonable doubt has been defined to be a doubt for which a reason could be given," was held to be misleading, apparently because of this definition of a *reasonable doubt*. In *Williams' case*, 52 Ala. 411, a charge was held misleading, which declared that the jury must acquit, "if from all the evidence there is a *probability* of the innocence" of the defendant. The two rulings in the cases of *Cohen* and of *Williams* are not reconcilable, and we think the former declares the correct rule. *Probability* is the state of being probable; and *probable* has been defined to be, "having *more evidence for than against*"—"supported by evidence which inclines the mind to belief, but leaves some room for doubt."—Webster's Dict.; Worcester's Dict. It clearly involves the idea of a *preponderance* of evidence, as used in connection with testimony. Manifestly, if the evidence *preponderates* in favor of the prisoner—that is, if the evidence in his favor *outweighs* or *overbalances* that against him—it is impossible for a jury not to entertain a reasonable doubt as to his guilt.—*Browning v. The State*, 30 Miss. 656.

We see no error in the refusal of the other charges requested by the defendant. Most of them are affected with the vice of assuming that the defendant was free from fault in the inauguration of the difficulty, or, at least, in failing to submit this aspect of the case to the jury for their determination. The others are ambiguous and involved in meaning, and were calculated to mislead the jury, and, for this reason, were properly refused.

For the error above mentioned, however, the judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The prisoner will, in the meanwhile, be retained in custody, until discharged by due course of law.

Hobbs v. The State.

Indictment for Grand Larceny.

1. *Argument of counsel*.—Under the rule laid down in the case of *Cross v. The State* (68 Ala. 476), as to unauthorized statements by counsel in their argument to the jury, which would be available on error,

[Hobbs v. The State.]

"the statement must be made as of fact, and the fact stated must be unsupported by any evidence." But the court, in laying down this rule, did not intend "to shackle discussion, nor to scrutinize narrowly and strictly inferences counsel may draw from proven facts;" and the rule does not apply to a statement made as an inference from the testimony, which falls within the legitimate line of argument.

FROM the Circuit Court of Limestone.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case charged the defendant, Scott Hobbs, with the larceny of a cow, the property of James Wilson. On the trial, as the bill of exceptions shows, issue being joined on the plea of not guilty, said Wilson testified that he lost his cow in April, 1882, and recovered her about two weeks afterwards; that the cow was unmarked when lost, and was freshly marked when recovered, a bit being cut out of the under side of the ear. Jim Mitchell, a freedman, a witness for the prosecution, testified that he knew the cow, and further stated: "I saw her on a Sunday in April, 1882, in Emma Frasier's lot; she was in a few feet of the road, just over the fence, in the lot, and had a rope, about four feet long, around her neck. It was about one hundred and fifty yards down the lane, to where the cow was in the lot, from the defendant's house. The next time I saw the cow was on the following Monday morning, in Julia Richardson's field, about twenty or thirty steps from where I saw her the day before, just across the fence that separated the lot from the field; she was tied in the corner of the fence, where she was eating. The field is on the side of the road, or lane, and the defendant's house on the opposite side. Defendant was present when I saw the cow on Monday, and, when asked about the cow, claimed her, saying that a man from Tennessee had left her with his wife, and told her, if neither he nor any one called for her, she or her husband could have the cow; and that he was not at home when the cow was left there. I told defendant that the cow belonged to Mr. Wilson, and that he had better give her up, or he would get into trouble about her; after which, he made no objections to giving up the cow to Mr. Willie Wilson, who was with me, and who drove the cow home. The defendant had no inclosure, or lot, except his yard which was fenced in with palings." Willie Wilson, who was a son of the prosecutor, testified substantially to the same facts as to the defendant's declarations and surrender of the cow. The defendant introduced several witnesses, who testified as to his good character. "This was all the evidence. The solicitor, in his closing speech, said: '*The defendant marked the cow, and hid her out.*' The defendant's counsel here reminded the solicitor that no such fact was in evidence before the jury; whereupon, continuing his

[Hobbs v. The State.]

argument, the solicitor said: '*Gentlemen of the jury, I say the defendant did put the cow in his aunt's lot, and marked her, and then hid her out; and you know it. Instead of putting this nice present to his wife or himself in his yard, which was fenced in, he tied her in the corner of the fence two hundred yards from his house, and marked her.*' The defendant objected to these remarks of the solicitor—that he put the cow in his aunt's lot, and marked her, and tied her out—on the ground that no evidence of such facts was before the jury; but the court overruled the objection, and the defendant excepted. The solicitor then continued his argument, on the assumption that the cow was hid out; to which argument the defendant objected," and duly excepted to the overruling of his objection. This ruling is the only matter here urged as error.

B. M. SOWELL, and W. R. FRANCIS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—We had hoped that, in *Cross v. The State*, 68 Ala. 476, we expressed ourselves so clearly, as not to be misunderstood. Speaking of statements of counsel which would be available on error, we then said: "The statement must be made *as of fact*; [and] the fact stated must be unsupported by any evidence." The language objected to in this case was manifestly uttered as an inference, and that inference we can not say was unsupported by any testimony. On the contrary, we think the inference drawn from the testimony was very reasonable and natural. We have no wish to shackle discussion, or to scrutinize, narrowly and critically, inferences counsel may draw from proven facts. Trial courts would be treading on dangerous ground, were they to exercise a severe censorship over the line of argument counsel may pursue. They must not allow them to constitute themselves unsworn witnesses, and to state, *as facts*, matters of which there is no testimony. But we have gone no further. On the contrary, we expressly said, in *Cross' case*, that "every inference counsel may think arises out of the testimony," is a legitimate subject of criticism and discussion. See *Motes v. Bates*, at the present term.

There is no error in the record, and the judgment of the Circuit Court must be affirmed.

[Brown v. The State.]

Brown v. The State.*Indictment for Assault and Battery.*

1. *Violent character of person assaulted; admissibility as evidence.*—In a prosecution for an assault and battery, where the defendant was himself the aggressor, he can not be permitted to adduce evidence of the bad character of the person assaulted, as a violent, dangerous, or turbulent man.

2. *Abusive or insulting language; admissibility as evidence.*—The statute which allows a defendant who is prosecuted for an assault, an assault and battery, or an affray, to “give in evidence any opprobrious words, or abusive language, used by the person assaulted or beaten, at or near the time of the assault or affray,” and declares that “such evidence shall be good in extenuation, or justification, as the jury may determine” (Code, § 4900), was “intended as a shield, and not as a sword;” and it can not be invoked by a defendant who first used insulting words, and struck the first blow.

FROM the Circuit Court of Butler.
Tried before the Hon. JNO. P. HUBBARD.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The defendant was indicted and convicted of assaulting and beating one Adams with a stick, or other weapon of like kind. It appears from the evidence that the defendant brought on the difficulty, by cursing Adams, and was also the aggressor in striking the first blow. There is no color of pretense that he was acting in self-defense.

Under this state of facts, it is very clear that the court committed no error whatever in excluding the evidence, offered by the defendant, as to alleged bad character of Adams. It is no more permissible to beat a blood-thirsty ruffian, without some good and lawful excuse, than the worthiest and most orderly citizen. The rule which must obtain here is analogous to that which applies to cases of homicide, where it is well settled, that a defendant, who was himself the aggressor in bringing on the difficulty, can not shield himself from punishment, either by proof of previous threats, or by showing the bad character of the deceased, as a violent, dangerous or turbulent man. A proper construction of the decisions of this court can leave no room for any misunderstanding or doubt as to this point.—*Roberts v. The State*, 68 Ala. 156, and cases cited; *Storey v. The State*, 71 Ala. 329; *Burke v. The State*, *Ib.* 377;

[Brown v. The State.]

Green v. The State, 69 Ala. 6; *De Arman v. The State*, 71 Ala. 351; *People v. Campbell*, 43 Amer. Rep. 257, and cases cited.

The general charge of the court was also, in our judgment, free from error. We can not see that the legislature intended to confer the benefit of section 4900 of the Code upon a defendant who has brought a difficulty upon himself, by the use of opprobrious words, or abusive language. This statute provides, that, "on the trial of any person under an indictment for an assault, an assault and battery, or an affray, he may give in evidence any opprobrious words, or abusive language, used by the person assaulted or beaten, at or near the time of the assault or affray; and such evidence shall be good in extenuation, or justification, as the jury may determine."—Code, 1876, § 4900. This section must be construed in the light of the common law, which never permitted mere words to justify a blow upon the person using them. As expressed by an ancient common-law writer, no words whatever could amount to an assault.—1 Hawk. P. C. p. 110, § 1. The purpose of the statute under consideration was to modify this rule, so as to remit the whole matter to the determination of the jury, who are permitted, in cases of this nature, to justify or extenuate the conduct of one who strikes another under the influence of passion engendered by insulting language, when used at or near the time of the difficulty or affray. This was a concession to the weakness of human nature, when fired by the heat of passion. The effect of the statute is to make abusive language legally tantamount to an assault, against which the party abused might defend himself by a blow, within the discretion of the jury. The defendant having first used abusive language, which might have justified his adversary in striking him, was the aggressor; and no aggressor, who brings on a difficulty, can justly invoke a rule of law intended for the purpose of self-defense. The statute, in other words, was intended to be resorted to as a shield, and not a sword.

What we have said above is intended only as a construction of this section of the Code. It in no wise contravenes the rule of the common law, which permits evidence of words or language, used by either combatant contemporaneous with an affray, or an assault and battery, to be considered by the jury, in connection with the circumstances of the case, for the purpose of explaining their nature by way of aggravation or mitigation.—2 Bish. Cr. Law (7 Ed.), §§ 25, 40; *Keiser v. Smith*, 71 Ala. 481.

Judgment affirmed.

Cowan & Co. v. Sapp.

Bill in Equity to set aside Sale under Execution, and to enjoin Action at Law by Purchaser.

1. *Setting aside sale under execution; remedy at law, and in equity.*—When a sale of lands under execution at law is impeached, because of mere error in the process, or on account of some error attending its execution, the court from which the process issued has exclusive jurisdiction to set aside the sale; but, if fraud or illegality attends the sale, or it has been followed by the execution of a conveyance casting a cloud upon the title, a court of equity has jurisdiction concurrent with the court of law to set it aside.

2. *Same, on ground that judgment was in fact satisfied.*—If the judgment was in fact satisfied at the time of the sale under execution, the court from which the process issued has undoubted jurisdiction to set aside the sale; but, if the process is regular on its face, and the sale is followed by a regular conveyance to the plaintiff in execution as the purchaser, the fact of payment resting in parol, a court of equity will intervene, at the instance of the defendant in possession, set aside the sale, and cancel the conveyance as a cloud on the title.

3. *Same; diligence required of plaintiff.*—A party who seeks to set aside a sale under legal process, whether by motion in the court from which the process issued, or by bill in equity, must act promptly, or must satisfactorily explain any unreasonable delay; but no time can be definitely fixed, within which the application must be made, since the proceeding is of an equitable nature, dependent upon equitable principles, and necessarily governed by the varying facts of each particular case. (Doubting the correctness of the general rule declared in *Abercrombie v. Conner*, 10 Ala. 296.)

4. *Same.*—In this case, more than three years after the sale having elapsed before the bill was filed to set it aside, the delay was held sufficiently explained by proof of the facts, that the payment of the judgment was made to the plaintiff in Nashville, Tennessee, on the same day the land was here sold under execution, and that he made no effort to recover possession, as purchaser at the sale, until about six months before the bill was filed.

5. *Parol evidence explaining receipt.*—A receipt given on the payment of money, whatever may be its terms, is open to explanation or contradiction by parol evidence; and any misdescription, or defective description of the debt, on which the payment was made, may be corrected or supplied by parol evidence.

6. *Acceptance of part, in satisfaction of debt.*—At common law, a promise by the creditor to accept less than the full amount of his debt, or its acceptance, no release being given, and the evidence of the debt not being surrendered, did not operate as a payment, nor as an accord and satisfaction; but, under the statute declaring that "all receipts, releases, and discharges in writing, must have effect according to the intention of the parties" (Code, § 3039), such acceptance may amount to full satisfaction.

[Cowan & Co. v. Sapp.]

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 13th April, 1882, by Doctor B. Sapp, against the persons composing the partnership of Cowan & Co., a mercantile firm doing business in Nashville, Tennessee; and sought to set aside a sale of lands under execution in favor of said Cowan & Co., at which they became the purchasers, to cancel and set aside the sheriff's deed to them, to have their judgment entered satisfied, and to enjoin an action of ejectment which they had brought to recover the land. The judgment of said Cowan & Co. was against the complainant and one Huffman as partners, was for \$240.60, besides costs, and was rendered by the Circuit Court of Blount county, on the 29th August, 1878; and it was founded on a promissory note for \$229.10, due and payable on the 27th October, 1877. An execution was issued on this judgment, and was levied, October 8th, 1878, on a tract of land in the possession of the complainant; and under this levy, on December 2d, 1878, the land was sold by the sheriff, Cowan & Co. becoming the purchasers at the price of \$300. The bill alleged that, before this sale, and while said execution was in the hands of the sheriff, "A. J. Stephens, in behalf of complainant and his said co-partner, Thos. Y. Huffman, paid to said Cowan & Co. the sum of \$93.60, in full satisfaction of said execution and costs, and, in evidence thereof, took from them their paper writing," or receipt, which was made an exhibit to the bill, in the following words: "*Nashville, Tenn., Nov. 6th, 1878. To note on Huffman & Sapp, due Oct. 26, '77, \$229.16. Rec'd of A. J. Stephens, Nov. 6th, 1878, ninety-three 60-100 dollars in full for our claim of above note against Huffman & Sapp. We agree, if our lawyers (Hamill & Dickinson) have collected this claim, to refund the same to said A. J. Stephens;*" signed, "COWAN & Co." The bill alleged, also, that the complainant continued in the possession of the land, by himself and tenants, without interruption, until the 27th September, 1881, when Cowan & Co. brought an action of ejectment to recover the possession; and the bill sought to enjoin the further prosecution of this action.

The defendants demurred to the bill, assigning the following as grounds of demurrer: 1st, that the complainant has delayed an unreasonable time, and shows no excuse for his delay; 2d, that he has a plain and adequate remedy at law; 3d, that the receipt shows on its face that it was not given in satisfaction of the judgment; 4th, that said receipt, "so far as it purports to be in full of said note, is without consideration beyond the amount paid;" 5th, that the bill "seeks by parol to contradict, alter, or add to the terms of said written instrument." The chancellor overruled the demurrer, and his decree is now assigned as error.

[Cowan & Co. v. Sapp.]

C. F. HAMILL, for appellants.—The bill is in the nature of a bill for specific performance, which is never decreed where the contract is founded in mistake, nor unless strictly equitable. 1 Brick. Dig. 602, § 760; *James v. State Bank*, 17 Ala. 69; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 Ala. 459; *Casey v. Holmes*, 10 Ala. 776. The receipt was evidently given by Cowan & Co. in ignorance of their judgment, and it does not purport to be given in satisfaction of the judgment. The bill does not allege any mistake in its terms. Beyond the amount actually paid, it is inoperative and worthless.—Cases cited in 1st Brick. Dig. 384, § 130. This was the rule of the common law, which must be presumed to prevail in Tennessee, where the payment was made and the receipt given.

GEO. H. PARKER, and J. W. INZER, *contra*.—The jurisdiction of a court of equity to grant relief, under the facts alleged in the bill, is well established.—*Ray's Adm'r v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198; *Dexter v. Strobach*, 56 Ala. 133; 2 Story's Equity, § 692; Rorer on Jud. Sales, §§ 855–56; *Rea v. Longstreet*, 54 Ala. 291; *Daniel v. Stewart*, 56 Ala. 278. That the bill was filed in time, see *Ray's Adm'r v. Womble*, 56 Ala. 32; *Abercrombie v. Conner*, 10 Ala. 296. A receipt is only *prima facie* evidence, and subject to explanation by parol.—1 Brick. Dig. 860, §§ 809–10. By statute, effect is to be given to the receipt according to the intention of the parties.—Code, § 3039. As to the law of Tennessee, see Tenn. Statutes, vol. 2, §§ 3789–90; 10 Yerger, 160; 10 Humph. 188; 2 Head, 116.

BRICKELL, C. J.—1. The jurisdiction of the Circuit Court, to set aside the sale of the lands, because of the satisfaction of the execution at the time it was made, can not be doubted. Every court has an inherent power to prevent or correct the abuse of its own process by parties controlling it, or by the officer charged with its execution.—*Mobile Cotton Press v. Moore*, 9 Porter, 679; *Abercrombie v. Conner*, 10 Ala. 393; *Henderson v. Sublett*, 21 Ala. 626; *Lankford v. Jackson*, *Id.* 650; *Lockett v. Hurt*, 57 Ala. 198. If the sale were impeached because of mere error in the process, or because of mere error or irregularity in its execution, the jurisdiction of the Circuit Court would be exclusive; for the correction of errors or irregularities in the judgments of courts of law, or in legal process, or its abuse, is not within the province of a court of equity. But, if fraud or illegality attends the sale, or if it has been followed by the execution of a conveyance casting a cloud upon the title, and which may be at any time employed to disturb the possession, the jurisdiction of a court of equity is concurrent with that

[Cowan & Co. v. Sapp.]

of the court of law.—*Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198.

2. If the execution was satisfied at the time of the sale of the lands,—and such is the averment of the original bill,—the plaintiffs in execution, to whom the satisfaction was made, being the purchasers, the sale is voidable. In some direct proceeding it must be avoided, to restore the defendants in execution to the condition in which they were when it was made. Sales of lands by sheriffs under legal process not void upon its face, which stands good until it is vacated by the judgment of a court of competent jurisdiction, unless it be process void because of the death of the party in whose favor it was issued, or because of the death of the party against whom it issues, can not be collaterally impeached.—*Ware v. Bradford*, 2 Ala. 676; *Fournier v. Curry*, 4 Ala. 321; *Hubbert v. McCollum*, 6 Ala. 221. The fact of satisfaction resting in parol, could not appear upon the face of the conveyance of the sheriff; nor would it appear from the judgment or execution, to which the conveyance refers as the source of the power of the sheriff to make the sale. The conveyance by the sheriff not disclosing the invalidity of the sale, at law, in an action for the recovery of the lands, it would prevail as valid and operative. It is within the peculiar jurisdiction of a court of equity, to intervene for the cancellation of conveyances of lands, at the instance of a party having rightful possession, the invalidity of which can be made apparent only by a resort to extrinsic evidence.—*Ray v. Womble*, 56 Ala. 32; *Rea v. Longstreet*, 54 Ala. 291.

3. A party seeking the vacation of a sale under legal process, whether he invokes the jurisdiction of the court from which the process issued, or the concurrent jurisdiction of a court of equity, must act promptly. Unnecessary, unreasonable delay in moving, will be regarded as a waiver, or as acquiescence in the irregularity, illegality or fraud, which may have attended the sale, if it be not accounted for satisfactorily. There is no period fixed and defined, within which the motion to vacate a sale must be made in a court of law, nor within which there must be a resort to a court of equity. Each case is, of necessity, controlled by its peculiar circumstances. In *Abercrombie v. Conner*, 10 Ala. 296, in answer to an objection that the party moving a vacation of the sale of lands, because of the satisfaction of the execution under which it was made, had too long slumbered upon his rights, the court said: "Upon the sale of lands under execution, a mere right of action passes to the vendee; but, when personal property is sold, the possession itself is delivered. In the latter case, the application to set aside the sale must be immediate, or, at least, as soon as reasonably may be, or the delay must be excused; but, when lands

[Cowan & Co. v. Sapp.]

are the subject, the motion may be made at any time before the purchaser takes possession, or recovers it by suit, unless the possession is acquired in so short a time after the sale that an application can not be conveniently made. Until the possession is disturbed, the parties in interest may have had no notice of the sale, or, if they have, perhaps may infer that the purchaser will not attempt to claim under his purchase. There is no necessity for the party in possession to be active, until the purchaser obtains possession, or makes an effort to acquire it." The length of time which had intervened between the sale and the motion for its vacation does not appear from the report of the case, nor does it appear whether the party complaining had notice of the sale at the time it was made.

In the preceding case of *Hubbert v. McCollum*, 6 Ala. 225, the court had said, in regard to the time a motion to avoid a sale of lands under execution should be made, that it would be most regular at the first term succeeding the return of the process, though, for satisfactory reasons, the court could interfere at a subsequent term. The case returned to this court, and it appearing that the party moving to set aside the sale, having full knowledge of the sale, and of the facts relied on for its vacation, had permitted more than four years to elapse before intervening, during a large portion of which period he had been engaged in litigating the title with the purchaser, the court said: "The law does not regard such delay with indulgence, and the inference of acquiescence on the part of the plaintiff in any supposed fraud or irregularities in the sale may well be drawn, requiring stronger proof to warrant the interposition of the court." *McCollum v. Hubbert*, 13 Ala. 289.

In *Daniel v. Modawell*, 22 Ala. 365, the deputy sheriff became the purchaser of lands at a sale made by the sheriff, having at the instance of the defendant in execution forbid the sale, and purchasing at a price greatly below the value of the lands. The plaintiff in execution permitted more than four years to elapse, during which time the purchaser had taken possession and sold to third persons. The court refused to interfere, though it was said, if a timely application had been made, there could have been no hesitation in vacating the sale. In *McCaskell v. Lee*, 39 Ala. 131, the motion was not made until more than four years after the sale, and until eighteen months after the purchaser had instituted suit for the recovery of the possession of the lands. There was no explanation of the delay,—no satisfactory reason given for it; under these circumstances, it was declared the motion could not be entertained.

We would hesitate to announce it as an inflexible rule, or as a general rule, as seems to have been expressed in *Abercrombie v. Conner*, *supra*, that a proceeding, either at law or in equity,

[Cowan & Co. v. Sapp.]

for the vacation of a sale of lands under legal process, will be entertained at any time before the purchaser takes possession, or recovers it by suit. Reasonable diligence, as well as good faith, should be rigorously exacted from parties seeking the disturbance of judicial sales, and the destruction of titles derived from them; and whether there has been reasonable diligence, must depend upon the particular circumstances—whether they are such as may have induced inaction, or ought to have quickened vigilance and action. It is certain that a party may not, in the absence of some satisfactory excuse, enter into litigation with the purchaser claiming a recovery of the lands, speculate upon its chances, and when he finds them doubtful, or when the litigation is determined adversely to him, then resort to a proceeding, either at law or in equity, for a vacation of the sale. *McCullum v. Hubbert*, 13 Ala. 289; *McCaskell v. Lee*, 39 Ala. 131. There can not be a time definitely settled, within which parties must resort to a judicial proceeding for the purpose of vacating the sale. The proceeding is of an equitable nature, dependent upon equitable principles, and is not capable of being controlled by fixed, inflexible rules. The rules which apply are analogous to the known rules of a court of equity in granting relief to a mortgagor, or those claiming under him, seeking to avoid a purchase by a mortgagee at his own sale, or a *cestui que trust* claiming to be relieved from a purchase by a trustee. There must not have been *laches*, operating injuriously to others; and there must not have been such unexplained acquiescence for a considerable period, with full knowledge of all the facts, as would afford cogent evidence of a waiver and abandonment of the right, if it be not the equivalent of a positive act of confirmation, or release.

4. More than three years intervened between the sale and the filing of the present bill. During this time, the complainant was in the undisturbed possession of the lands, and the purchasers were inactive until within about six months, when they commenced a suit at law for the recovery of possession. In view of the fact that the payment of the judgment was made on the day of sale, and in another State, the plaintiffs accepting it, most probably, in ignorance of the intended sale of the lands, from their inaction the complainant may have inferred that they did not intend, and would not attempt, to claim under the purchase, which must have been made for them without their knowledge, and was subject to their ratification or repudiation. The delay in moving to avoid the sale is satisfactorily explained by the circumstances.

5. The receipt given on the payment does not describe the judgment or execution, nor refer to either, but is descriptive only of a promissory note corresponding with that upon which

[Cochran et al. v. Miller et al.]

the judgment was founded. A receipt for the payment of money is peculiarly open to parol evidence. It is not in fact regarded as a contract in writing, but as an acknowledgment or admission of the party giving it,—of but little more force or dignity than a mere verbal declaration. Misdemeanors, or imperfect, inaccurate references to the account or debt on which the money is received, can be corrected or supplied by parol evidence.—2 Parsons' Contracts, 555; 1 Brick. Dig. 860, § 809. And whatever may be its terms,—though purporting to be in full of all demands,—it is subject to explanation or contradiction; and by parol it may be shown that it was given in mistake of fact, or by surprise; or that it was obtained fraudulently, by misrepresentation, or by a concealment of material facts.—*McKeaggy v. Collehan*, 13 Ala. 828.

6. It is true that, at common law, a promise by the creditor to accept, in satisfaction, a less sum than was really owing to him, or the acceptance of such sum, no release being given, and the evidence of debt not being surrendered, was not operative as a payment, nor as an accord and satisfaction. The statute has, to a certain extent, abrogated this rule of the common law, by declaring that "all receipts, releases, and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties to the same."—Code of 1876, § 3039. If the receipt, though the sum paid was much less than the debt really due, was given and intended as a full discharge of the debt; if there was no mistake of material facts, no misrepresentation or concealment of such facts, the statute requires that it must have effect according to the intention of the parties.—*Smith v. Gayle*, 58 Ala. 600.

The demurrer to the bill was not well taken, and the decree of the chancellor overruling it must be affirmed.

Cochran et al. v. Miller et al.

Bill in Equity for Foreclosure of Deed of Trust, Removal of Cloud on Title, Account, etc.

1. *Homestead exemption; governed by what law.*—As against the claims of creditors, the right to a homestead exemption must be determined by the law which was of force when the debt was created, or the liability incurred.

2. *Same; who entitled to in 1859.*—Under the laws which were of force in 1859, a homestead exemption was only reserved to a debtor who was

[Cochran et al. v. Miller et al.]

the head of a family (Rev. Code, § 2880) ; and an unmarried man, having no inmate of his house dependent on him, was not the head of a family, although he had hired servants or laborers in his employment.

3. *When decree is final.*—A decree in chancery is final, when it ascertains all the rights of the parties litigant, although there may be a reference to the register, to ascertain facts necessary for an account, and to state the account between the parties.

4. *Same.*—A decree rendered under a submission on pleadings and proof, granting relief to the complainant as prayed, is final, and necessarily involves and implies the overruling of demurrers to the bill, although they are not overruled in terms.

5. *Irregularities in putting cause at issue.*—When all the parties really affected by the decree have had their day in court, all being adults and *sui juris*, and have acquiesced in the decree until after an appeal is barred, irregularities in putting the cause at issue as to some of the defendants do not render the decree void, nor authorize the court to change or set it aside at a subsequent term.

6. *When deed of trust may be enforced by beneficiaries; amended and supplemental bills.*—Sureties on a *supersedeas* bond, for whose indemnity a deed of trust has been executed by their principal, may file a bill to foreclose the deed so soon as the judgment is affirmed, and are not required to first pay it themselves; and if they pay the judgment pending the suit, thereby becoming themselves entitled to the proceeds of sale (which the bill prayed might be paid to the creditor), this is supplemental matter, which may be brought in by amendment; and the failure to bring it forward is a mere irregularity, which does not affect the validity of the final decree.

7. *Decree partly final, and partly interlocutory.*—A decree may be partly final, and partly interlocutory; as, where it settles all the equities between the parties, and the principles on which relief is granted, but orders an account to be taken, or other proceedings to be had to carry it into effect; in which case, the chancellor can not, at a subsequent term, alter the principles on which relief was granted (as to which the decree is final), but may modify or change the interlocutory directions for carrying it into effect; and this court, on appeal, sued out after the completion of the statutory bar, is limited to an inquiry into the regularity of the subsequent proceedings, when they have progressed into a final decree which will support an appeal.

8. *Marshalling securities between creditors.*—Where an entire tract of land is conveyed by deed of trust for the indemnity of the grantor's sureties, and, an execution of junior lien being afterwards levied on it, the grantor asserts a right of homestead exemption to a part; the plaintiff in execution, becoming the purchaser at his own sale, has a right to insist that the land claimed as exempt shall be first subjected to the payment of the debt for which the sureties are bound, and against which they are indemnified by the deed.

9. *When appeal lies; and when mandamus.*—When the chancellor improperly sets aside or modifies, at a subsequent term, a final decree rendered at a former term, the remedy is by *mandamus*, and an appeal does not lie.

APPEAL from the Chancery Court of Marshall.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 13th September, 1877, by Thomas J. Cochran, Thomas A. Street, and David C. Jordan, against Henry L. Miller, Albert G. Henry, Mrs. Sarah A. Nickles, and her husband, Richmond Nickles; and sought to foreclose a deed of trust on a tract of land,

[Cochran et al. v. Miller et al.]

which said Miller had conveyed to said Cochran, as trustee, for the benefit and indemnity of Street and Jordan, as sureties for Miller on a *supersedeas* bond, on an appeal to this court from a judgment recovered against him by said Albert G. Henry; and it also asked an account of the rents, and of the reasonable compensation of the trustee, and to have the complainants' rights under the deed established and declared as against the claim of Mrs. Nickles, who had purchased a portion of the land at a sale under execution in her own favor. The deed of trust was dated January 13th, 1875, and was duly recorded. The judgment appealed from was affirmed by this court on the 31st July, 1876, and judgment rendered against the appellant and his sureties on the *supersedeas* bond; and an execution on this judgment was in the hands of the sheriff when the bill was filed. The execution in favor of Mrs. Nickles was issued on a decree in her favor, rendered by the Probate Court of Madison county on the 27th June, 1868, against said Henry L. Miller, as the administrator of William M. Patton, deceased, of which she was a distributee. The administrator's bond was executed in May, 1859. Several executions on this decree were issued, and placed in the hands of the sheriff of Madison county; but the first one sent to Marshall county was issued on the 20th January, 1875, and placed in the hands of the sheriff of that county on the 10th February, 1875; and it was levied by him on said tract of land on the 5th July, 1875. The land was not sold under this levy, for want of time; but an *alias pluries* having been issued and levied, the land was sold on the 1st Monday in August, 1876, except 160 acres claimed by the defendant as a homestead exemption, Mrs. Nickles becoming the purchaser, and receiving the sheriff's deed.

An answer to the bill was filed by Nickles and wife, in which was incorporated a demurrer on several specified grounds, which it is unnecessary to notice; and they also filed a cross-bill, in which they sought to set aside the deed of trust to Cochran on the ground of fraud, or, in the alternative, to have the lands claimed as exempt by Miller first subjected to the satisfaction of the debt for which Street and Jordan were bound as sureties. An answer to the original bill was also filed by Miller, and an answer to the cross-bill of Nickles and wife; and he prayed that this answer might be taken as a cross-bill to their cross-bill, and relief granted to him as to matters which are immaterial as the case is here presented.

The cause having been submitted, at the April term, 1880, for decree on pleadings and proof, the chancellor (Hon. H. C. SPEAKE) rendered the following decree at the ensuing August term, 1880: "This cause having been submitted at the last term, for decree upon the pleadings and testimony noted by

[Cochran et al. v. Miller et al.]

the register, and, being difficult, was taken under advisement, for decree in vacation; and on consideration, it appearing to the satisfaction of the court that the complainants are entitled to the relief by them prayed, it is therefore ordered, adjudged, and decreed by the court, that the lands described in complainants' bill, and in the deed of trust therein mentioned and offered as evidence in this case, be, and the same are hereby, condemned and decreed by the court to be sold for the satisfaction of the debt due complainants Street and Jordan, the amount thereof to be ascertained as hereinafter directed. It is further ordered, that so much as remains of the amount that may arise from the sale of said lands as were sold by the sheriff and purchased by said Sarah Nickles, after the satisfaction of the amount due on said deed of trust, with the costs of this suit, be paid over to the said Sarah A. Nickles. It is further ordered, that the cross-bill of said H. L. Miller be, and the same is hereby dismissed, and that said Miller pay the costs thereof, to be taxed by the register, for which let execution issue. It is further ordered, that the register ascertain how much was paid by the said Street and Jordan for the said Miller, and when paid, and calculate the interest on the said sums so paid, from the time the same was paid, to the first day of the next term of this court. The register will also state an account of the trusteeship of the said Cochran, charging him, as such trustee, with the rents received by him for lands taken possession of by him as such trustee, for each year, including this year, and allowing him credit for all permanent improvements by him made, and all taxes by him paid each year. The register will also ascertain a suitable compensation to be paid to the said Cochran, for his services as such trustee. Before executing this reference, the register will give notice to the parties, or their solicitors of record, of the time and place of executing the same, and is authorized to use as evidence all affidavits, depositions or documents, that have been made, taken or filed in the cause; together with such other evidence as may be offered, by any of the parties. He will make a note of all the evidence by him used on said reference, with all objections and exceptions thereto, and report the same, with his proceedings hereunder, to the next term of this court. All other questions are reserved until the coming in of said report."

The register stated the accounts under this order, and made his report to the next ensuing October term, 1880; exceptions to the report being filed by Nickles and wife, who also filed their petition asking a modification of "the decree of reference." The chancellor overruled the exceptions, and confirmed the report, "except so much thereof as refers to the rents of said lands; and said cause being further considered," as the

[Cochran et al. v. Miller et al.]

decree then proceeds, "it is ordered, adjudged, and decreed by the court, that the former decree of reference be modified and changed, as follows: The register will ascertain and report how many acres of the land bought by Mrs. Nickles, at the sale made by the sheriff, were capable of and fit for cultivation, for each of the years 1877, 1878, 1879, and 1880. (2.) He will ascertain how much is the yearly rental value of said lands per acre, for each of said years, 1877, 1878, 1879, and 1880. (3.) He will ascertain how much was paid out for each of said years, 1877 to 1880 inclusive, by said Cochran as trustee, for necessary repairs, permanent improvements, clearing of lands, and taxes paid. (4.) He will deduct from each year's rent the amount paid out by said Cochran, for said repairs, improvements, clearing and taxes, for each year, and calculate interest thereon to the first day of the next term of the court." At the same term, by consent of parties, the trustee was ordered to rent out all the lands publicly.

At the July term, 1881, the register reported an account of the rents as stated by him, and exceptions to his report were filed by Nickles and wife, who also moved to charge the trustee, in addition to the amounts charged by the register, with the reasonable rents of the lands claimed as exempt by Miller; and the cause was continued, as to these matters, until the next term. At the July term, 1882, the cause was submitted for final decree, on all the pleadings and proof; the register's note of the submission stating, that the cause was submitted, on the part of Nickles and wife, on their answers and demurrers to the original bill, their cross-bill, motion to charge the trustee with rents, evidence adduced by them, and objections filed to interrogatories; and on the part of the complainants, on "(1st) record of submission at April term, 1880; (2d) decree of August, 1880; (3d) petition of Nickles and wife, dated October 11th, 1880; (4th) decretal orders on said petition, dated October 12th, 1880; (5th) register's report of July 21st, 1881, with testimony of Miller and Cochran; (6th) reports of Cochran, trustee, dated July 21 and 22, 1882; and if the decree of August, 1880, is not held final, and the cause is considered on its original merits, then complainants offer the pleadings and proof noted in submission at April term, 1880."

Under this submission, at the ensuing January term, 1883, the following decree was rendered in the cause by Chancellor N. S. GRAHAM: "Now, on consideration, it is ordered and decreed, that the exceptions to the register's report read and filed in January, 1881, be, and they are hereby overruled; but the said report must stand over until the coming in of further reports, as hereinafter ordered. It is further ordered and decreed, that the demurrers of Nickles and wife, filed with

[Cochran et al. v. Miller et al.]

their answer to the original bill, numbered 6, 7, and 9, be and are sustained; but each and all of their other demurrers are overruled. It is further ordered and decreed, that it be and is hereby referred to the register, to ascertain and report, as soon as practicable, the reasonable value of the rents of all the lands conveyed by Miller to Cochran as trustee, &c., as follows: 1st, of all that portion of said land bought by Mrs. Sarah Nickles at the sheriff's sale on the 24th August, 1876; 2d, all the balance of said lands not sold by the sheriff, viz., the 160 acres claimed by Miller as homestead exemption; 3d, the rental value of the residence, or home house occupied by said Miller, on said 160 acres; each separately, and each for the year 1877, and every year since, up to and including the date of said report; and credit each year's rent with the taxes paid on account of said lands and house, reasonable expense of repairs and improvements, and charge interest on the net balance of each year, to the date of said report; and in the general result add all together, and show the aggregate balance on account of all of said rents; and let this account be in form of debtor and creditor, charging said Cochran with all of said rents, or their value, whether collected or received by him or not, and crediting him, as above ordered, with the taxes, repairs, and charges for improvements, each year separately; it being adjudged and held, for reasons herewith filed, that the said Miller is not entitled to any homestead as against any of the parties to this suit, and that when the said Cochran took possession of all of said lands as said trustee, as alleged in the original bill, it must be regarded and held that he did so in the interest of all the parties interested in said estate, whether beneficiaries under said deed of trust, or purchaser of the equity of redemption; and he is therefore chargeable with all the rents, or the value thereof, that he has or might have collected, from and including the year 1877, to date of said report. In executing any order of reference in this case, the register will give the parties reasonable notice," &c. "It is further ordered and decreed, that the register turn over to said Cochran, without delay, all notes, accounts or obligations for rents taken by Cochran, as trustee, to the end that he may proceed to collect the same, if he sees fit to do so; and that he, as such trustee, pay the same, or the proceeds thereof, to the said Street and Jordan, the beneficiaries of said deed of trust, or their solicitors of record; it being held by the court, that they (or the said trustee) are entitled to the rent, and that Mrs. Nickles is entitled to the benefit of all such credits, as the purchaser of the equity of redemption. But this order is upon the faith and confidence of the court, that the pleadings in the case shall be amended as indicated in the opinion herewith filed, as soon as the parties may have an

[Cochran et al. v. Miller et al.]

opportunity to do so, and as they may be advised. It is further ordered and decreed, that the consideration of the original bill, and of the cross-bill of Nickles and wife, be postponed for the present, to the end that the respective complainants therein may have an opportunity to amend their respective bills, as provided by the rules of this court, if they desire to do so."

The appeal was sued out by the complainants in the original bill, on the 1st February, 1883, and the following assignments of error were made: "1. The court erred in its decree of date January 19, 1883. 2. The court erred in its said decree, in disregarding as final the decree of August, 1880. 3. The court erred in its said decree, in disregarding the order of reference of October, 1880, as *res adjudicata* and conclusive. 4. The court erred in its said decree, in sustaining the demurrer of Nickles and wife. 5. The court erred in its said decree, in re-modifying the modified order of reference of November 12th, 1880."

CABANISS & WARD, for appellants.—1. The decree of August, 1880, was a final decree.—*Bank of Mobile v. Hall*, 6 Ala. 141; *Jones v. Wilson*, 54 Ala. 54; *Wyatt v. Garlington*, 56 Ala. 576. So far as this decree was final, the court had no power to modify or change it at a subsequent term. 2. The decretal order of October, 1880, was *res adjudicata* and conclusive as to the modification of the order of reference. The court was asked to modify the order, so as to charge the trustee with reasonable rents for the entire tract of land; and did so modify the order as to charge him with reasonable rents for the 560 acres, but only with the rents actually received for the 160 acres. This was the equivalent of overruling a motion for a new trial, and is *res adjudicata* after the expiration of the term. But for Rule 83, the court could not have made the modification of said order of reference. Is not the operation of said rule confined to orders "preparatory of a cause" for final decree, not extending to orders embraced in or following the final decree? 3. The modified order of October, 1880, was correct in holding the trustee chargeable only with the rents actually received from the 160 acres of land, the possession of which was reserved to Miller by the deed until a sale was required. 4. In sustaining the 6th, 7th, and 9th demurrers to the bill, the chancellor not only exceeded his power, by changing the former final decree, but ruled erroneously on the principle of law involved.—*Brandt on Suretyship*, 274, § 193, citing 15 Ohio, 253; 7 Fla. 284; 12 Md. 78; 2 La. Ann. 469.

PARSONS & PARSONS, *contra*.—The decree of August, 1880, is not a final decree, under the authorities cited for appellant.

[Cochran et al. v. Miller et al.]

It does not dispose of the demurrer of Nickles and wife, nor of their cross-bill.—*Broughton v. Wimberly*, 65 Ala. 549. If that decree be final, the decree from which this appeal was taken does not interfere with it, but simply goes further, and holds the trustee accountable for reasonable rents of all the lands, with a view to having them accounted for in settlement of Henry's judgment.

STONE, J.—Henry L. Miller's liability to Mrs. Nickles rests on an administration bond, executed in 1859. It follows, that his right to homestead exemption must be governed by the law as it then stood, and not by the constitution of 1868, nor by the statutes enacted afterwards.—*Watts v. Burnett*, 56 Ala. 340; *Blum v. Carter*, 63 Ala. 235. As against the claim of Mrs. Nickles, neither the constitution of 1868, nor any later enactment, can exert any influence.

The homestead exemptions of force in 1859 were expressly reserved for the use of the family.—Rev. Code, § 2880; Code of 1876, § 2844. Mr. Miller was never the head of a family; never had a family, under the uniform rulings of this court. He had never married, and there was no inmate of his house dependent on him for support. Hired laborers, or servants, do not constitute a family within our statutes. Mr. Miller's homestead was not exempt from either claim it is sought to be made subject to.—1 Brick. Dig. 906, §§ 228 to 231; *Wilson v. Brown*, 58 Ala. 62; Thompson on Homestead, §§ 46. 47.

In all the rulings in this cause, it has been uniformly held, that the mortgage claim of Cochran, trustee, Street and Jordan, beneficiaries, is paramount, and is entitled to be first paid; while the claim of Mrs. Nickles comes in next, for the *residuum*. In this, we fully concur with the chancellors who rendered the decrees; and upon this subject we will not farther comment.

The real subject for our consideration—the one which is made the subject of the assignments of error—is the last decree in the cause; the one bearing date January 19th, 1883. For appellant it is contended, that the decree of August 27th, 1880, taken in connection with the decretal order giving directions to the register, bearing date October 12th, 1880, is a final decree, settling the equities of the case; and that therefore the decree of January 19th, 1883, was unauthorized, and should be reversed. If the decree of August, 1880, was and is final, then the decree of January, 1883, must be disregarded, so far as it assumes to vary the relief of the first decree.—*Ex parte Cresswell*, 60 Ala. 378.

The mortgage, or trust-deed, under which appellants claim, was executed and properly recorded in the early part of the

[Cochran et al. v. Miller et al.]

year 1875. The decree in favor of Mrs. Nickles, under which she claims, was rendered in another county, and was not a lien on the lands when the mortgage was executed. One Henry had recovered a judgment against Miller on a money demand, from which the later prosecuted an appeal to this court, giving a *supersedeas* bond, with Street and Jordan as his sureties. To indemnify his said sureties against loss, he executed the trust-deed, conveying to Cochran, as trustee, the tract of land on which he resided, containing about seven hundred and twenty acres; reciting that it was "for the purpose of saving harmless and indemnifying his said sureties." The deed contains the following, among other provisions: "That the said Henry L. Miller shall be allowed to retain the use and possession of said land, until a sale of the same, or any part thereof, becomes necessary to protect and indemnify from loss his said sureties. If said judgment should be affirmed on said appeal, and the sum is not paid and satisfied by the said Henry L. Miller, or some one for him, then the said Thomas J. Cochran, as trustee, . . . shall have, and is hereby invested with, full power and authority to take possession of said land, or any part thereof, and sell the same for cash to the highest bidder," &c. The deed further provides, that out of the proceeds of sale, the trustee shall pay, "first, the costs and expenses of this deed and such sale; second, the amount of such judgment and the costs thereof."

While the appeal was pending in this court, Mrs. Nickles had the seven hundred and twenty acres of land levied on, under execution issued on her said decree. Miller claimed homestead of 160 of the 720 acres, and the sheriff proceeded to sell under her execution the remaining 560 acres; and she became the purchaser, receiving the sheriff's deed therefor. The judgment of *Henry v. Miller*, from which the appeal was prosecuted, was affirmed in this court, and a judgment rendered against him and his sureties, Street and Jordan. The present bill was filed, after the affirmance in this court, to have the claim of Street and Jordan, sureties of Miller, declared a first lien on the property; to have the mortgage foreclosed, and the proceeds of the property applied to the extinguishment of Henry's judgment. It sets forth, among other things, that the debt to Henry had never been paid, and contains the following averments: "That about the beginning of the present year, 1877, the said Henry L. Miller, reserving to himself the possession of about one hundred and sixty acres of said land [describing it], which he desires to retain as a homestead exemption, placed the other portion of said lands in the possession of said Jordan, with authority to rent out the same, and apply the rents thereof towards the satisfaction of said judg-

[Cochran et al. v. Miller et al.]

ment in favor of said Henry. . . . That complainant Jordan, recognizing the right of said Cochran, as trustee as aforesaid, to the possession of said lands, has surrendered the same to him," &c. According to this averment, as we understand it, Miller surrendered to Jordan only five hundred and sixty of the seven hundred and twenty acres of land, retaining the other one hundred and sixty under claim of homestead; and Jordan turned over to Cochran, the trustee, only the five hundred and sixty acres he had received from Miller. In the succeeding sentence of the bill is this language: "And the said Cochran, as trustee as aforesaid, has also, under and pursuant to said deed of trust, taken quiet and peaceable possession of the aforesaid one hundred and sixty acres of land, which, for convenience of description, is hereinafter called the *Exemption Tract*, with a view to their being subjected to sale for the protection of complainants, Street and Jordan, in the manner authorized by said deed of trust." Construing these averments together, they amount to a statement, that Cochran, as trustee, took possession of the entire tract, seven hundred and twenty acres, for the purposes of the trust. This question will become important hereafter.

The defendants, Nickles and wife, in the interest of the latter, filed answers to said bill, and also a cross-bill. They also specified grounds of demurrer to the original bill. Their defense had several objects: To have the trust-deed to Cochran, trustee, set aside as fraudulent; and, failing in this, to marshal the securities, and have the one hundred and sixty acres, claimed as homestead, first sold for the benefit of Street and Jordan, before resorting to the lands purchased by Mrs. Nickles, and to have the *residuum* applied to the extinguishment of Mrs. Nickles' claim, on the theory that she, having acquired the equity of redemption by her purchase, was entitled to it. And in this connection, Mrs. Nickles sought to charge Cochran, and through him the beneficiaries, Street and Jordan, with rents of the entire tract of land, from the time the original bill avers Cochran took possession of it. Miller, in answering the cross-bill of Mrs. Nickles, sought to make his answer a cross-bill to it. There was testimony taken in the cause, as we learn from the note of the testimony, and from the decree of the chancellor; but it is not found in the record before us. We suppose it was omitted by consent, as not deemed necessary to the questions raised.

The cause, with the cross-bills, the demurrers and the testimony, was submitted for decree; and in August, 1880, the chancellor rendered his decree. He decreed the entire tract of 720 acres of land to be sold for the satisfaction of complainants' demands, the amount to be ascertained afterwards.

[Cochran et al. v. Miller et al.]

He next decreed, that so much of the proceeds of the 560 acres, bought by Mrs. Nickles, as remained after satisfying the demand secured by the trust-deed, costs, &c., be paid to Mrs. Nickles. He then dismissed Miller's cross-bill to Mrs. Nickles' cross-bill, at his costs. The decree ordered a reference to the register, to report to the next term of the court; and directed him to state an account of Cochran's trusteeship, and to charge him, as such trustee, "with the rents by him received for lands by him taken possession of as such trustee, for each year including this year," and allowing him certain credits; and to report suitable allowance to Cochran as trustee.

A petition was then filed by Mrs. Nickles, asking a modification of the directions to the register, so as to direct him "to ascertain what was the reasonable value of the rent of all said lands, from and including the year 1877, down to, and including the year 1880, and to charge said trustee with that amount," with certain allowances as credits. This petition was filed in connection with certain exceptions filed by Mrs. Nickles to the register's report, made under the decree of August, 1880. In October, 1880, the chancellor decreed on said exceptions, and on said petitions; overruled the exceptions, and confirmed the report in all respects, "with the exception of so much of the report as refers to the rents of the land in said bill described." As to the rents he decreed as follows: "The register will ascertain and report how many acres of the land bought by Mrs. Nickles at the sale made by the sheriff were capable of, and fit for cultivation, for each of the years, 1877, 1878, 1879, 1880." He then directed that the register ascertain the yearly rental value of said lands for each of said years, and ascertain the necessary expenses incurred by the trustee during each of said years in improvements, repairs, and the payment of taxes; and to report at the next term. Under this amended order of reference, the register made his report to the July term, 1881, which was then filed, and a motion made by complainants to have it confirmed. This motion was continued, with leave to Nickles and wife to file exceptions thereto, and with leave to bring the motion to confirm, and the exceptions thereto, before the chancellor at chambers. At the July term, 1882, Nickles and wife moved the court for leave to file exceptions to said report, and for an order charging the trustee with the rental value of the homestead, from 1877 to 1881, inclusive; and they filed their exceptions, nine in number, with their said motion.

At said July term, 1882, Nickles and wife again submitted said cause for decree, on pleadings and evidence. The complainants, Cochran and others, in bar of a further hearing, except on the register's report, submitted, and relied on as final, the decrees of August and October, 1880, and contended that

[Cochran et al. v. Miller et al.]

the chancellor could not review nor reconsider the questions ruled on in those decrees. The chancellor, having taken the case under advisement, rendered his decree at the January term, 1883. In that decree, he considered the sufficiency of the original bill, and sustained some of the grounds of the demurrer filed thereto. The effect of his ruling was, that the original bill, to be sufficient, must be amended, in the matter pointed out by him. He also detected errors, or irregularities, in the matter of putting the original bill at issue. He left the case open for the needed amendments, but declared that the complainants in the original bill had the first and paramount lien. He ruled that Miller, the common debtor, was entitled to no homestead exemption, and that the complainants, having charged in their bill that Cochran, the trustee, had taken possession of the entire tract of land, would not be allowed to disprove their own averment, by showing that he did not, in fact, take possession of the one hundred and sixty acres, claimed by Miller as homestead. He further declared, that the register, in stating the account with Cochran, trustee, would charge him with the rental value of all the lands, including that claimed as homestead, and the home-house, from and including the year 1877, until the coming in of the report, with interest on each year's valuation, and certain credits, not necessary to be here mentioned. From this decree the present appeal is prosecuted by the complainants; and, as we have said, the main question argued before us, renders it necessary for us to determine whether the decree of August, 1880, was final, in that sense which would authorize an appeal therefrom.

It was declared in this court, at an early day, and has ever since been followed, that a decree is final, when it ascertains all the right of the parties in litigation, although there may be a reference to the register, to ascertain facts necessary for an account, and to state the account between the parties. *Weatherford v. James*, 2 Ala. 170; *Bank of Mobile v. Hall*, 6 Ala. 141; *Ansley v. Robinson*, 16 Ala. 793; *Jones v. Wilson*, 54 Ala. 50; *Broughton v. Wimberly*, 55 Ala. 549; *Wyatt v. Garlington*, 56 Ala. 576; *Hastie v. Aiken*, 67 Ala. 313; *Smith v. Coleman*, 59 Ala. 260.

It is objected that the decree of August, 1880, was not final, because it did not dispose of the demurrers to the original bill. True, they are not mentioned in the decree; but there is a decree, granting relief to complainants. Such decree could not be rendered, without overruling the demurrer in effect. *Wyatt v. Garlington*, 56 Ala. 576. See, also, *Walker v. Cuthbert*, 10 Ala. 213; *Eastland v. Sparks*, 22 Ala. 607.

It is further objected against the finality of the decree, that the chancellor failed to rule on the prayer of the cross-bill of

[Cochran et al. v. Miller et al.]

Mrs. Nickles. This is answered by the record itself. The decree granted relief to her, which she could only obtain under her cross-bill.

In the decree of January, 1883, the chancellor comments on certain irregularities in the preparation of the cause, such as the failure to put the original cause at issue as against the defendants Miller and Henry. We find decrees *pro confesso* were properly taken against them. But, if this had not been done, it is difficult to conceive how it could affect any of the parties really interested in this controversy. All the parties interested in the controversy raised on this record, are the complainants and Nickles and wife. Probably, if an appeal had been taken in time from the decree of August, 1880, on proper assignment of error that the cause had not been put at issue against a material party, and sustained by the record, the decree would have been reversed. But we do not understand this to be the rule, except in favor of persons not *sui juris*, when a final decree has been rendered, and acquiesced in until after appeal is barred, if all the parties really affected by the decree have had their day in court.—*Craft v. Russell*, 67 Ala. 9; *Brewer v. Browne*, 68 Ala. 215; *Cresswell v. Jones*, 68 Ala. 420; *McCall v. McCurdy*, 69 Ala. 65. Mere irregularities do not render the decree void.

The chancellor, in his decretal order of January, 1883, comments on the failure of the original bill to aver that Street and Jordan had paid the debt to Henry, for which they were the sureties of Miller. This was not necessary to the equity of the bill as framed. Their liability having become fixed by the affirmance of the judgment in this court, they were authorized to have the trust-deed executed, or foreclosed, and the proceeds of the property applied to the payment of the debt to Henry. Brandt on Suretyship, § 193, and note 3. If it be objected that, pending the litigation, Street and Jordan paid Henry his claim, and thereby became entitled to the proceeds of the mortgaged property, instead of Henry, to whom the bill prayed its payment, this, at most, presented a question of supplemental matter, which, under our statute, could and should have been brought in by amendment of the bill. Its failure did not render the decree void, but was at most an irregularity, which can not affect the validity of a final decree, from which the right of appeal is barred.

Recurring to the decree of August, 1880, we hold it settled the equities between these parties, and was so far final that it would have supported an appeal to this court. "The test of the finality of a decree, which our decisions have prescribed, is not whether the cause is still in progress in the Court of Chancery, awaiting further proceedings, which may be necessary to

[Cochran et al. v. Miller et al.]

entitle the parties to the full possession and enjoyment of the rights it has been declared they have; but, whether a decree has been rendered settling those rights."—*Jones v. Wilson*, 54 Ala. 50; *Broughton v. Wimberly*, 65 Ala. 549; *McLemore v. Nickols*, 37 Ala. 662. But a decree may be partly final, and partly interlocutory.—*Malone v. Marriott*, 64 Ala. 662. If it settle all the equities between the parties, it is, to that extent, final. If it is necessary to take an account, or other proceedings must be had to carry it into effect, to this last-named extent it is interlocutory, and may be moulded, modified or altered by the chancellor, as any other interlocutory decree may be. The principles of relief can not be altered, for they are final. Directions for carrying the decree into effect may be modified, for they are interlocutory.

Applying these principles to this case, the chancellor had no authority to consider the demurrers, nor the sufficiency of the bills. They had passed into a final decree. And this court can not consider them, because the decree pronounced upon them was barred, before the present appeal was taken. The giving of directions to the register, in the matter of carrying the decree into effect, presents a different question. As to these, the decretal orders of August and October were interlocutory. These the chancellor had authority to modify at any time before final decree on the account. In this aspect of the decretal order of January, 1883, we find nothing to object to. As we have shown, the original bill avers that Cochran, as trustee, took possession of the entire seven hundred and twenty acres of land, for the purposes of the trust. This estops complainants from disproving it, and renders the trustee liable for the rent of the whole tract. Complainants have a rightful, paramount claim on the whole tract, for their indemnity against the debt to Henry. Mrs. Nickles has a secondary claim on five hundred and sixty acres of the land, subordinate to that of complainants. This presents the conditions which call for a marshalling of securities.—1 Wait's Act. & Def. 353. What is claimed as the homestead exemption should be first sold and exhausted under complainant's mortgage, before resorting to the five hundred and sixty acres purchased by Mrs. Nickles.

Under our chancery system, there may be two final decrees in one and the same cause, and there may be, and frequently are, two appeals therefrom. In foreclosure and kindred suits, when a decree is rendered, settling the equities, this is final, so as to authorize an appeal, although a reference is ordered to take and state an account, preparatory to the execution of the decree; and after the reference is held, reported upon, and the chancellor decrees thereon, then a second final decree is rendered, from which appeal may be prosecuted. On such second-

[Humes v. O'Bryan & Washington.]

any appeal, questions may be raised, growing out of instructions to the register, the introduction of testimony before him, and exceptions filed to his report. But, to authorize an appeal in this second phase of the case, the decree on the matters referred must be final. We have no statute authorizing an appeal from interlocutory proceedings of this class. The decree of January, 1883, is not final, either in substance or form. It simply declares rules for the after government of the register, which, so far as this record discloses, have never been acted on. This is not a final decree. If the object of the present appeal is to get rid of so much of the decree of January, 1883, as goes behind the final decree of August, 1880, appeal, at this stage of the proceedings, is not the remedy.—*Ex parte Cresswell*, 60 Ala. 378.

Appeal dismissed.

Humes v. O'Bryan & Washington.

Action on Account for Goods Sold and Delivered.

1. *Deposition of witness present in court.*—When a witness, whose deposition has been taken, is personally present in court at the trial, and is competent to testify, his deposition should be suppressed, and he should be examined orally.

2. *Continuance on terms as to taking depositions.*—In the exercise of its discretionary power to grant continuances "upon such terms as to the court shall seem proper" (Rule No. 16, Code, p. 160), the court may, in granting a continuance to the defendant, order that the plaintiff, "in consideration of said continuance," be allowed to take the depositions of certain named witnesses, "on filing interrogatories and giving notice as in such cases required by law," dispensing with a preliminary affidavit.

3. *Same; exception to such order.*—Although the minute-entry granting such continuance further recites that the defendant *excepted* to the order, the exception avails nothing, when the record shows that the defendant had the full benefit of the continuance: he must accept or reject the continuance, with the terms annexed, as an entirety.

4. *Declarations against interest, by deceased person.*—As a general rule, the declarations of a third person are regarded as mere hearsay, and are not competent evidence; yet, they become competent, as the best evidence of which the nature of the case will admit, when it is shown that they were against the interest of the declarant when made, that he had competent knowledge of the facts stated, and that he is since deceased.

5. *Same.*—This principle applies, where the defendant is sued as a partner with a person since deceased, on an account contracted with plaintiffs, and renders admissible, as evidence for the defendant, the declaration of the deceased that they were not partners at the time the account was contracted, on proof of the insolvency of the alleged partnership as such when the declaration was made.

6. *Declarations explanatory of possession.*—The declarations of a per-

[Humes v. O'Bryan & Washington.]

son who is in possession of property, made in good faith, explanatory of his possession, and showing the character or extent of his claim to the property—whether in his own exclusive right, or as tenant of another; or the capacity in which he holds, as partner, trustee, or agent of another—are competent evidence as a part of the *res gestæ*, whenever the fact of possession itself is pertinent to the issue, no matter who may be the parties to the litigation.

7. *Same; proof of partnership.*—On this principle, the defendant in this case being sued as partner in a mercantile business with a person since deceased, by whom the business was conducted; held, that the acts and declarations of the deceased, while in possession of the goods, and carrying on the business, so far as they were explanatory of his possession, as indicating whether the goods were his own, or were claimed by him as joint partner with another person, were competent and admissible as evidence, as part of the *res gestæ*; but were not admissible evidence, as against the defendant, of the existence of the alleged partnership, unless some notice or knowledge of them was brought home to him; though they were relevant to corroborate or rebut, as the case may be, other evidence offered to prove the existence or non-existence of such partnership.

8. *General reputation; what may be proved by.*—The existence or non-existence of a partnership can not be proved by general reputation; nor can the character of a person's possession of a stock of goods be proved by any general understanding in the neighborhood in which he carries on his business.

9. *Same.*—The existence of a partnership having been once shown by independent testimony, proof of a general reputation, or common report of its existence, in the neighborhood in which the business is carried on, is competent to show a probable knowledge of the fact by the plaintiff, on the principle that a person would be likely to know any fact generally known in his neighborhood; and for the like reason, the notoriety of a dissolution, or, perhaps, of the non-existence of a partnership, may be shown, to charge a party with implied notice of the fact; but this principle can not be so extended, as to charge a party residing in a distant city with implied knowledge or notice of a fact, because it is generally known in a remote local neighborhood, without proof of other facts tending to show that he had opportunities of hearing the common report.

10. *Declarations of partner; admissibility as against another.*—The declarations of one person, as to the existence of a partnership between himself and another person, are not admissible evidence against the latter, to prove the fact of partnership, unless they were made in his presence, or fall within some recognized exception to the general rule excluding hearsay evidence.

11. *Same.*—The declarations of one partner, while in possession and carrying on the business, strictly explanatory of his possession, whether against interest or not, are admissible as evidence against the person sought to be charged as his co-partner, in corroboration of other and independent evidence of the alleged partnership; but his declarations as to where he had bought the goods, or a portion of them, or on whose account, being merely narrative of a past transaction, do not come within this principle; and his declaration of his inability to induce the defendant to become his surety for a sum of money, which he wished to borrow, is not admissible.

12. *Authority of partner.*—A mercantile business not being necessarily or usually incident to the business of farming, the partner who conducts the business of a partnership in farming has no implied or incidental authority to carry on a mercantile business on joint account in connection with it.

13. *Liability as partner to third persons.*—Although there may be no partnership in fact, a person who suffers himself to be held out as a

[Humes v. O'Bryan & Washington.]

partner with another, may be charged as a partner for debts contracted with third persons, who dealt with the supposed partnership in ignorance of the true relations existing between the parties.

14. *Admission implied from silence.*—Plaintiffs having written to defendant in reference to their account, on which the action is founded, addressing him as a partner with the person, since deceased, by whom the business was carried on; his failure to answer the letter would, if unexplained, operate as an implied admission on his part of the fact of partnership.

15. *Telegrams; construction of, and relevancy as evidence.*—When the contract sued on was negotiated and consummated between the parties by telegraph, the several dispatches, as written instruments, must be construed by the court; but, when they passed between other persons, and are not the foundation of the action, they may be relevant evidence of a collateral fact, and may be submitted to the jury for that purpose; as to establish the fact of partnership, where they related to the existence and solvency of the alleged partnership, and the answer to inquiries was sent with the consent of the defendant sought to be charged.

16. *Same.*—A telegram sent to a merchant, in reply to an inquiry as to the solvency of a commercial partnership, saying "*Sell small bill, and on short time,*" may authorize another person to act on the information, and to sell goods on the faith of the partnership, if it was sent with the knowledge of the defendant sought to be charged as a partner.

17. *Charge invading province of jury.*—The court can not assume an admission as proved, although there was evidence tending to establish it, when it was in fact controverted.

18. *Limitation of partner's authority; burden of proof.*—Any private agreement between partners, or limitation placed on the authority of the partner by whom the business is conducted, is of no avail against a creditor who has contracted in ignorance of it; and the *onus* of showing notice or knowledge of such agreement or limitation is on the partner who disputes his liability on an account contracted within the scope of the partnership.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This action was brought by O'Bryan & Washington, partners doing business in the city of Nashville, Tennessee, against L. R. Glover and Milton Humes, as partners doing business under the firm name of Glover & Humes; and Glover having died, the suit was prosecuted to judgment against Humes alone, as surviving partner. The action was commenced on the 22d September, 1873, and was founded on an account for goods sold and delivered by plaintiffs, during the year 1872, to said Glover & Humes, amounting to about \$750. The complaint contained the common counts only. The defendant Humes pleaded the general issue, "in short by consent," and two special pleas, denying his liability as a partner in the alleged firm of Glover & Humes, and denying that the account was contracted by him, or by any one authorized to bind him; and the cause was tried on issue joined on these several pleas. The evidence adduced on the trial was taken down by a stenographer, and is set out at length in the bill of exceptions, which covers 357 pages of the transcript. Numerous exceptions were re-

[Humes v. O'Bryan & Washington.]

served by the defendant to the rulings of the court during the trial, principally on objections to evidence; and on these exceptions 97 assignments of error are here made. It is only possible, within the limits of a report, to give such a statement of the facts as will render intelligible the several points decided by this court.

Before entering on the trial, the defendant moved the court to suppress the depositions of E. M. Carney, J. W. Carter, A. Glover, and George W. Glover, "because the affidavits for the taking of said depositions were not made by plaintiffs, as required by law, which would authorize the taking of said depositions; and because, as to the depositions of said A. Glover and G. W. Glover, said witnesses were present, and could be examined orally. Thereupon, the plaintiffs read to the court an order made in this cause, at the last term of the court," in these words: "Came the parties, by their attorneys, and it is ordered by the court that this cause be continued on account of the sickness of L. P. Walker, one of the counsel for the defendant, on motion of the defendant; and in consideration of said continuance, it is ordered by the court that the plaintiffs be allowed to take the depositions of W. Richardson, J. W. Carter, A. N. Glover, G. W. Glover, and E. M. Carney, on filing interrogatories and giving notice as in such cases required by law; to which order defendant excepts." The court thereupon overruled "defendant's motion to suppress said depositions, or either of them, and defendant excepts." The motion to suppress the depositions of the Glovers, on the ground that they were personally present in court, was renewed when each of the depositions was offered in evidence, and was again overruled.

Carney and Carter were clerks and agents of the plaintiffs, and each of them testified to the presentation of the account, on which the suit was founded, to the defendant in Huntsville, and to his repeated promises to pay it, and requests for indulgence, though he refused to give his note for the debt; and each of them testified that, in these several interviews, the defendant did not deny the existence of the partnership of Glover & Humes, nor dispute his liability as a partner for the debt. A. Glover and G. W. Glover were sons of said L. R. Glover, and had acted as a clerk and salesman in the store of their father; and each testified to various facts and circumstances tending to show that a partnership in the store existed between their father and said Humes,—as, that the books were kept in the name of Glover & Humes, the boxes marked in their name, and accounts made out in their name; that a revenue license was taken out in their name, and posted in a conspicuous place in the store; that Humes frequently came to the store, went

[Humes v. O'Bryan & Washington.]

behind the counter, examined the goods, and sometimes slept in the back room connected with the store. Several exceptions were reserved to portions of this testimony, and other testimony of a similar character, which it is unnecessary to state at length.

The account sued on was contracted by Glover himself, while in Nashville, on the 12th April, 1872, and amounted to \$587.82. He had previously bought a small bill of goods, amounting to about \$60, in the name of Glover & Humes, for which cash was paid; and a larger bill, amounting to several hundred dollars, which was paid, on the order of Humes, out of the proceeds of certain bales of cotton shipped to Nashville. On the 12th April, when he desired to buy the goods on credit, the plaintiffs consulted, as one of them testified, with Wright, Hooper & Co., another mercantile firm in Nashville, of whom Glover also desired to purchase a bill of goods, and agreed that a telegraphic dispatch should be sent by the latter firm to W. Richardson, their attorney in Huntsville, inquiring as to his solvency, or the solvency and standing of Glover & Humes; and a dispatch was accordingly sent by them, on that day, which, as delivered to Richardson, was in these words: "*How do you regard Glover & Hemm, Leeman's Ferry, Alabama?*" Richardson at once answered, "*Sell only for cash; no such firm as I know of;*" but, meeting Humes on the street, as he came from the telegraph office, and informing him of the dispatch and his answer, Humes expressed regret, as Richardson testified, lest his answer might injure Glover, and prevent him from getting the goods which he wished; and after some conversation between them, as to the terms of which the testimony was conflicting, he sent another dispatch, in these words: "*Sell small bill, and on short time.*" This last dispatch was delivered first in Nashville, to Wright, Hooper & Co., and was shown to plaintiffs on the same day; and one of the plaintiffs testified, that they sold the bill of goods to Glover on the faith and credit of it.

The store in which business was carried on by said Glover, or Glover & Humes, was at Leeman's Ferry, in Morgan county, Alabama, on a plantation which belonged to Governor R. Chapman, and which said Glover and Humes were cultivating under a contract of purchase. The store was opened in the latter part of 1871, or the early part of 1872, and the business was discontinued in 1873, having proved to be disastrous. As to the business relations existing between Humes and Glover, Humes thus testified as a witness for himself: "In the latter part of 1871, I made arrangements with Glover to cultivate the plantation in Morgan county known as the 'Chapman place,' in conjunction with him, during the year 1872. The

[Humes v. O'Bryan & Washington.]

business relation was to commence on the 1st January, 1872, and to end at the end of the year. Glover was then living in this county, on a place which he owned, and I employed him to go over himself and superintend the gathering of the crops on the 'Chapman place;' so he was in my employment in the latter part of the year 1871, in the capacity of having the crops gathered. The business relation between us during the year 1872 was this: Governor Chapman wanted to dispose of the place, and agreed to sell to Glover and myself, the purchase-money to be paid on time—five or six years, I think—in installments each year. Under the arrangement between us, Glover was to superintend the cultivation of the place; and I employed him and his son Angelo, at a stated amount—I think it was somewhere about six or eight hundred dollars that I was to pay him for their services in superintending the place. He was a man of limited means, and had no income; and I agreed to furnish the supplies for the hands during the year, all the supplies the hands would need during the year. I also agreed to furnish the stock and the farming implements for the cultivation of the place, except one or two head of stock (I think it was) which Glover said he could furnish. The distinct understanding between us was, that the supplies I sent there were to be — the tenants were to get them, and he was not to purchase anything on a credit; that was part of the agreement. After I was paid for the supplies I had furnished, and also for the use of my stock, or for the stock, if the amount made was sufficient to pay for it, then the overplus profits of the cultivation of the land that year I agreed that Glover should have one half of it. Under that arrangement between us(?) the crop year of 1872, and that relation terminated at the end of that year." He further testified that the contract between them was reduced to writing, but he had not preserved any copy of it; and that Glover was not authorized to contract any debts on his account, or on account of the business.

Geo. S. Gordon, whose deposition was taken by the defendant, thus testified: "I heard L. R. Glover speak in reference to the business relations between himself and the defendant (Humes). He stated, emphatically and repeatedly, that the partnership or business connection between them had never been for anything but planting purposes only, and that for debts contracted by him (Glover) Humes was not liable, and knew nothing about them when they were contracted. He further said, that there were written articles of agreement between himself and Humes, which he did not have, and the substance of which he could not recollect, except that they related solely to planting and the planting business, and never at any time related to anything else; that the only occasion

[Humes v. O'Bryan & Washington.]

when he heard their contents read, was when they were read in Humes' office to Ledbetter. Glover further disowned any knowledge of the telegrams, until these suits were instituted." The witness further stated, that these declarations were made by Glover in the office of Humes & Gordon, no person but the three being present, and that they were made with special reference to the liability of Humes on the account here sued on. The plaintiffs objected to the interrogatories calling for these declarations, and, on their motion, the court excluded the entire deposition; to which ruling the defendant excepted.

The defendant introduced P. L. Harrison as a witness, by whom he proposed to prove, in substance, that in May, 1872, Glover applied to him for a loan of \$300, saying that he wanted it to pay some debts which he had contracted in Nashville; and that Glover further said, in answer to inquiries made by Harrison, that Humes was not his partner except in the planting business, and that Humes would not become surety for the money if loaned. The court excluded this evidence, on the plaintiffs' objection, and the defendant excepted. The defendant introduced M. McCutcheon as a witness, and proposed to prove by him, "that shortly after these goods, shipped by plaintiffs to Glover & Humes at Leeman's Ferry, were received by Glover at the Chapman place, he took a full wagon-load of them, boxed them up, and sent them to Vienna, to Ledbetter & Glover, a firm composed of said L. R. Glover and J. M. Ledbetter." The court sustained an objection by plaintiffs to this question, and the defendant excepted. Said McCutcheon further stated, that he sold liquor on the premises, during the year 1872, "in a side room joining the store-room;" that he acted for Glover, and paid the money over to him; and that the liquor belonged to Glover. "as witness understood from him." The court excluded this evidence, on objection by plaintiffs, and defendant excepted. The defendant further proposed to prove by this witness, "that he went with Glover from the Chapman place to Somerville, in the spring of 1872, when Glover told him that he was going to get a license to sell liquor, that Humes didn't know anything about it, and that he didn't intend he should know anything about it." The court excluded this evidence, on objection by the plaintiffs, and the defendant excepted; and he also reserved an exception to the refusal of the court to allow him to ask the witness this question: "Was it, or not, the understanding in that neighborhood, in 1872, that Glover and Humes were simply partners in running the farm that year, and were not partners in any mercantile or commercial business?" The defendant further proposed to prove, by James McCutcheon, that accounts contracted for goods sold at the store were, by the direction of Glover, sued

[Humes v. O'Bryan & Washington.]

on in his name alone, before a justice of the peace; and he reserved an exception to the exclusion of this evidence. These several rulings of the court were based on the principle, as stated by the court, "that any act or declaration of Glover, tending to show that this was not a partnership, is not admissible as against these creditors."

The defendant proposed to prove, by the witness McCutcheon, "that in April and May, 1872, after the purchase of these goods by Glover from plaintiffs, and whilst the goods were on the premises, under the control, and in the possession of said Glover, and before any difficulty had arisen between Glover and Humes, or between plaintiffs and Humes, and when everything was moving on smoothly on the plantation, under the direction and immediate control of Glover, said Glover told him, over and over again, that the goods belonged to him individually, and that Humes had no interest in them, and proposed that he (witness) should join him as a partner in the goods." The court excluded this evidence, and the defendant excepted. The defendant then offered in evidence a certified copy of a mortgage executed by T. E. Williams to said L. R. Glover, dated April 1st, 1872, and purporting to be given to secure a debt contracted for supplies furnished to enable the mortgagor to make a crop during the year 1872; but the court rejected it as evidence, holding "that no declaration, act, or admission of Glover, tending to show either that he was or was not a partner, is admissible on this issue;" and to this ruling the defendant duly excepted.

During the examination of G. G. O'Bryan, one of the plaintiffs, as a witness for them, he produced a letter addressed to them, dated February 20th, 1872, and signed in the name of Glover & Humes; being the letter which ordered the first bill of goods (that for \$59), and said to be written on "one of the letter-heads of Milton Humes." It being proved that this letter was in the handwriting of said Glover, and Humes testifying that he had never seen or heard of it until it was produced on the trial, the defendant moved to exclude it from the jury as evidence; and he excepted to the overruling of his motion.

"At the request of the plaintiffs, the court charged the jury in writing," as follows: "Under the issues formed in this case, the burden is upon the plaintiffs: they must prove the correctness of the account for the goods sold, and also that, at the time of the sale of the goods, an actual partnership existed between Glover and Humes in the mercantile business, or that Humes held himself out to plaintiffs, or to the world, so as to induce them to believe that he was a partner of said Glover in said business. To establish a partnership between themselves,

[Humes v. O'Bryan & Washington.]

the jury must look to the intention of the parties. It is not necessary that the articles of partnership must be in writing. It may be parol, or verbal; as to creditors and the outside world, may be inferred from the acts of the parties—such as, intimacy between the parties; how the firm had their accounts made out; how they kept their books, and how their boxes of goods were marked; admitting the correctness of debts made by the firm, or promises to pay debts against the firm. But, to make the above named inference (?)—such as, how the accounts were made out, or how the books were kept, or how the boxes were marked—evidence against Humes, it must be shown that he had some agency in keeping the books, making out the accounts, or marking the boxes, or having known or found out that they were so kept, made out or marked. It is not necessary to determine in this case whether the contract between Glover and Humes created a partnership between them, or otherwise; because, if it were established that a partnership in farming existed between them, *it does not authorize either partner to contract in the firm name, for any other purpose than was necessary to carry on said farming business.* The account sued on is such an account as is usually made between merchants, and it therefore devolves on the plaintiffs to prove that a mercantile partnership, not a farming partnership, actually existed, or can be inferred.

“Under these general principles, if the jury find, from the evidence, that Humes admitted, to questions asked him, that he was a partner of Glover & Humes; that when debts were presented to him, made out against Glover & Humes, he promised to pay them; that he, *knowing that the books of the firm were kept in the name of Glover & Humes, made no objection thereto, but impliedly or expressly assented thereto; that he, knowing that goods were being shipped with the boxes marked Glover & Humes, made no objection thereto; that he, knowing that Glover, prior to the making out of the account sued on, had been buying goods in the name of Glover & Humes, made no objection thereto; that if he knew that the license had been taken out in the name of Glover & Humes, and made no objection thereto; or that Glover had been writing letters in the name of Glover & Humes, and made no objection thereto, knowing said letters to have been so written; or that on the 12th April, 1872, Humes had been informed that a telegram had been received inquiring how the firm of Glover & Hemm, Leeman's Ferry, stood, and, being informed that said telegram referred to Glover & Humes, did not deny the existence of said firm:* Now, if the above circumstances all existed, and existed at and prior to the time of the buying of said goods by Glover in the name of Glover & Humes, and these

[Humes v. O'Bryan & Washington.]

facts were known to plaintiffs, and to the outside world, at the time the goods were so sold; then these facts, if found to be true, established a mercantile partnership between Glover & Humes as to creditors, and Humes would be liable for the payment of this debt, if proved to be correct and unpaid. On the contrary, *if the jury find, from the evidence, that Humes, when asked if he was a partner of Glover's in the mercantile business, denied such partnership; that when debts were presented to him, made out against Glover & Humes, he denied his liability therefor; that he never knew the books were kept in the name of Glover & Humes, or that goods were shipped in their name, or that boxes were marked in their name, or that Glover, prior to 12th April, 1872, had been buying goods or writing letters in their name, or that the license had been taken out in their name; or that on said 12th April, 1872, when informed of said telegram inquiring how Glover & Hennes stood, and that the firm meant was Glover & Humes, he then and there denied such partnership; these facts, if found to be true, do not establish a partnership, and the verdict must be for the defendant.*

"The letter purporting to have been written by Glover & Humes, of date February 20th, 1872, addressed to O'Bryan Washington, having been proved to be in the handwriting of Glover, is not evidence against Humes to establish a partnership between him and Glover in the mercantile business, *unless the jury believe, from the evidence in the case, that Humes sanctioned the writing of said letter, or authorized it to be done.* The telegrams offered in evidence are not to be considered as an authority to plaintiffs to sell Glover & Humes, or Glover for Glover & Humes, even a small bill on short time, unless the proof satisfies the jury that Humes knew the first telegram from Nashville was sent in the interest of plaintiffs, as well as of Wright, Hooper & Co. *If the jury believe, from the evidence, that when Humes was notified of the receipt of the telegram from Nashville, and that the same was supposed to refer to the firm of Glover & Humes, and, being informed of Richardson's reply thereto, expressed sorrow at the sending of such a dispatch; and that he and Richardson consulted together, and agreed on Richardson sending the second dispatch; and that Humes, in such conversation, did not deny such partnership; then this is a circumstance the jury can look to, as evidence tending to show a partnership between Glover and Humes as merchants.*

"The admission of Humes, made subsequently to April 12th, 1872, that a partnership in the mercantile business did on that day exist between him and Glover, is evidence tending to show that a partnership did exist between them on that day, but does

[Humes v. O'Bryan & Washington.]

not estop or preclude him from now denying it, or proving that in fact such partnership did not exist on that date. *The negligence of Humes to answer letters written him which treat the firm of Glover & Humes as actually existing on 12th April, 1872, denying such partnership, such letters having been written and such negligence occurring subsequent to said 12th April, 1872, is evidence tending to show the existence of such partnership at that date, but does not estop or preclude him from now denying or proving that in fact no such partnership did then exist.*"

To the several italicized portions of this charge exceptions were duly reserved by the defendant, and he also excepted to the following additional charge, which the court gave on the request of the plaintiffs: "If the defendant knew that Glover was purchasing goods in the name of Glover & Humes, or kept books in the name of Glover & Humes, or marked his boxes in the name of Glover & Humes, or had license to sell whiskey in their name, or that he had the opportunity of knowing; then these are circumstances from which the jury may infer a partnership."

The defendant requested the following charges, and reserved exceptions to the refusal of each:

1. "Richardson's first telegram was not, according to the legal construction of written instruments, withdrawn by his second telegram; and his second telegram, legally construed in connection with the first, does not mean *sell small bill on short time* to Glover & Humes, but *small bill on short time* to Glover."

2. "If the second dispatch was sent by Richardson after a conversation with Humes, and on the faith of that conversation, it can be regarded only as an authority to Wright, Hooper & Co. to sell small bill on short time, and not as an authority to any one else to make such sale, and no other person had a right to rely or act upon it."

3. "The several telegrams offered in evidence are to be taken and construed together, and, so taken and construed, they do not contain any statement that there was any partnership, or firm known as Glover & Humes; and these telegrams can only be considered as a circumstance to put the plaintiffs on inquiry as to whether there was such a partnership."

4. "In determining whether or not a partnership existed between Glover and Humes, the jury can and should look to the manner in which the purchases of merchandise were made in Huntsville from McCalley and others; and if they believe said purchases were made by Humes individually, or on his authority alone, these facts must be considered by them in making up their verdict, as to whether a partnership existed."

[Humes v. O'Bryan & Washington.]

5. "If the jury find that plaintiffs sold the goods solely on the faith of the second telegram sent by Richardson to Wright, Hooper & Co., then the jury would be bound to find for the defendant."

All the rulings to which exceptions were reserved by the defendant, are now assigned as error.

L. P. WALKER, W. Y. C. HUMES, and GEO. S. GORDON, for appellant.—(1.) The depositions of the Glovers should have been suppressed, since they were present in court, and were examined as witnesses.—*Com. Bank v. Whitehead*, 4 Ala. 637; *Goodwin v. Lloyd*, 8 Porter, 237; *Eddins v. Wilson*, 1 Ala. 237; *Gardner v. Bennett*, 38 N. Y. Sup. Ct. 197; 1 Abb. Law Dic. 342; *Emlaw v. Emlaw*, 20 Mich. 11. (2.) The depositions of Carney and Carter should have been suppressed, because taken without any affidavit having been made.—Code, §§ 3069-70, 3077; *Worsham v. Goar*, 4 Porter. 441; *Brown v. Turner*, 15 Ala. 832; *Guice v. Parker*, 46 Ala. 616. (3.) The declarations of L. R. Glover should have been admitted as evidence. They were statements of facts of which he possessed competent knowledge, and were at variance with his interest. 1 Greenl. Ev. §§ 147-9; *Overton v. Hardin*, 6 Cold. (Tenn.) 375; *Ivatt v. Finch*, 1 Taunton, 141; *Danforth v. Carter*, 4 Iowa, 230; *Lucas v. De la Cour*, 1 M. & Sel. 249; *Peace v. Jenkins*, 10 Ired. 356; *Higham v. Ridgway*, 1 Smith's L. C. (7th Amer. ed.) 343; *Starke v. Keenan*, 11 Ala. 518; *Raines v. Raines*, 30 Ala. 425; *Union Canal Co. v. Lloyd*, 4 Watts & Ser. 394; 2 Whart. Ev. § 1200. They were also admissible because explanatory of possession.—Cases cited in 1 Brick. Digest, 843, § 558; *Clealand v. Huey*, 18 Ala. 343; *Thomas v. Wheeler*, 47 Mo. 363; *Stephens v. Williams*, 46 Iowa, 540. (4.) The evidence showing, or tending to show, a public and notorious disavowal of this alleged partnership, in the neighborhood in which the business was carried on, was competent, and should have been admitted.—*Lovejoy v. Spofford*, 3 Otto, 430; *Bernard v. Torrance*, 5 Gill & J. 383; *Robinson v. Worden*, 33 Mich. 316. General reputation thereof is admissible, to impute knowledge to the plaintiffs of the existence or non-existence of such partnership.—*Carter v. Whalley*, 1 B. & Ad. 11; *Turner v. McIlhenny*, 8 Cal. 575. (5.) The charge of the court as to the defendant's negligence and admission presumed from silence, was an invasion of the province of the jury, and was misleading.—*M. & C. R. R. Co. v. Lyon*, 62 Ala. 71; 21 Ala. 219; 22 Ala. 502; 29 Ala. 246, 374; 25 Kansas, 391. (6.) The court erred, also, in selecting certain enumerated facts, upon which to base a conclusion, thereby withdrawing from the consideration of the jury other facts

[Humes v. O'Bryan & Washington.]

bearing on the same issue.—66 Ala. 275, 570; 59 Ala. 92; 47 Ala. 659; 58 Ala. 406; 22 Ala. 502, 796; 23 Ala. 17; 28 Ala. 514; 7 Porter, 556. (7.) The qualification in the general charge which was excepted to—"unless the jury believe, from the other evidence, that Humes sanctioned the writing of said letter, or authorized it"—was unsupported by any evidence, and was therefore abstract.—66 Ala. 461; 60 Ala. 104; 53 Ala. 536. (8.) That portion of the charge which, after selecting a series of facts, asserted that "these facts, if found to be true, do not establish a partnership," was erroneous, because, by the effect it imputed to the selected facts, the burden of proof is shifted to the defendant, whilst the defendant's sworn plea imposed it on the plaintiffs.—*Pennington v. Woodall*, 17 Ala. 685; 28 Ala. 602, 693; 47 Ala. 564; 55 Ala. 154. (9.) The telegrams were written instruments, and should have been construed by the court.—31 Ala. 59, 701; 58 Ala. 438; 60 Ala. 582; 66 Ala. 306; 17 Wallace, 124; *Whilden & Sons v. P. & M. Bank*, 64 Ala. 1. (10.) The court should have declared, as the proper construction of the telegrams, that they conferred no authority on plaintiffs to sell to Glover.—*McDonald v. Bewick*, 43 Mich. 438; *Grant v. Dabney*, 19 Kansas, 388; *Hund v. Geier*, 72 Ill. 393; *Schomberg v. Cheney*, 3 Hun, N. Y. 677; *Segars v. Segars*, 71 Maine, 530. (11.) These telegrams ought to have awakened plaintiffs' diligence to make full inquiry as to Glover's authority. In dealing with him without further inquiry, they assumed the risk of his actual authority.—Whart. Agency, § 137.

D. P. LEWIS, and BRANDON & JONES, *contra*.—(1.) The continuance asked by defendant was granted on condition that the plaintiffs might take the depositions of the witnesses named, and the terms were accepted by the defendant. The Glovers were personally present in court, and were subjected to a full cross-examination; and this cured the only objection to the depositions. (2.) A person may be charged as a partner, either because he is a partner in fact, or because he has held himself out as a partner, whether to the plaintiff in particular, or to the world in general.—Parsons on Partnership, pp. 62, 63, 65, 67, 71. (3.) As to what constitutes a partnership, see *White v. Toles*, 7 Ala. 569; *Howze v. Patterson*, 53 Ala. 207. That there was a partnership in this case, is conclusively shown by the subsequent conduct of the parties, construing and recognizing their relations as a partnership.—*Howze v. Patterson*, 53 Ala. 205; *McGrew & Harris v. Walker*, 17 Ala. 824; Parsons on Partnership, 71, note; also, pp. 85–8. According to the testimony of the defendant himself, he and Glover were partners in farming.—Parsons, *supra*; 24 Howard, 536; 44

[Humes v. O'Bryan & Washington.]

N. H. 52; 43 Barb. 285; 6 Ala. 215; 3 Ala. 733; 27 Ala. 245; 30 Ala. 728. If they were partners for one purpose, and Glover engaged in another business in connection with it, without objection or dissent on the part of Humes, then Humes became, as to third parties, an actual partner in that business. Parsons on Partnership, 121. (4.) Limitations or restrictions, though binding as between the partners themselves, do not affect third persons, to whom they are unknown. 2 Greenl. Ev. §§ 481, 485; *Winship v. U. S. Bank*, 5 Peters, 529; *Gill v. Kuhn*, 6 S. & R. 333; *Churchman v. Smith*, 6 Whart. 146; *Tillier v. Whitehead*, 1 Dallas, 269; Story on Partnership, § 101; Parsons on Contracts, 93, 94, 101; *Mauldin v. Br. Bank*, 2 Ala. 205; *Cutlin v. Gilder*, 3 Ala. 536. (5.) Whoever dealt with Glover in good faith, relying on the acts and conduct of the parties as partners, is entitled to his action against the partnership.—Amer. L. Cases, 442; *Hart v. Clark*, 56 Ala. 19; *Wagner v. Simmons & Co.*, 61 Ala. 146. (6.) Independent of the question of actual partnership, Humes is liable to these plaintiffs, because he held himself out in this particular transaction as a partner with Glover.—2 Greenl. Ev. § 483; Collyer on Part. §§ 85, 97, 770, 774-5; 2 Kent, 27; 2 H. Bla. 235, 245; 6 S. & R. 258; 2 McLean, 347; 21 Penn. St. 390, 393; 42 Ala. 179. (7.) Any conversation between Humes and Glover, or between Gordon, Humes and Glover, is, as to these plaintiffs, *res inter alios acta*, and cannot be received to affect their rights. (8.) The telegrams were not contracts, but were offered for the single purpose of establishing the fact of partnership.—1 Greenl. Ev. §§ 275, 277, 280, 300.

SOMERVILLE, J.—1. The motions severally made by the appellant, in the court below, to suppress the depositions of George W. and Angelo Glover, should each have been sustained, and the court very clearly erred in overruling them. These witnesses were personally present in court at the time of the trial, when their depositions were offered in evidence. The reason, or existing necessity for taking the depositions, having been removed by the personal presence of the deponents, their oral testimony in open court then became the best evidence. It is the settled and incontrovertible rule, in the absence of a statute to the contrary, that the deposition of a witness is inadmissible, when the witness himself is present in court at the trial, and is competent in every respect to testify.—Starkie's Ev. (Shar.) 409, 410; *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

2. We see no error, however, in the action of the court refusing to suppress the depositions of the witnesses, Carney and Carter. The record shows that the court, at a previous

[Humes v. O'Bryan & Washington.]

term, had granted a continuance of the cause to the defendant, upon his application; and the order proceeds to recite, that, "*in consideration of said continuance,*" it was ordered by the court, that the plaintiff be allowed to take the depositions of sundry witnesses, including the two last named, "*on filing interrogatories and giving notice as is required by law; to which order,*" it is added, "defendant excepts."

It cannot be questioned that *nisi prius* courts possess a large discretionary authority in granting or refusing continuances of pending causes between litigants. It is a power essential to the prompt administration of justice, and its exercise is beyond the jurisdiction of the appellate court to control or revise. It is common practice to grant such applications on *conditions*, such as the payment of costs, the admission of certain facts, or the waiving of irregularities in depositions, the taking of which has not been in strict conformity to statutory requirements. The rule of practice, governing applications for continuance, is very broad in its provisions, declaring that "such *terms* may be imposed, *as to the court shall seem proper.*"—Rule No. 16, Code (1876), p. 160. The objection urged is, that the court, by its order, dispensed with the preliminary step of an *affidavit*, which is a statutory requirement for the taking of depositions, in civil cases, before a commission can issue for this purpose. If the court can require the admission of an entire statement of an absent witness, as a term or condition of continuance (which is unquestionable practice), it can certainly require the applicant to dispense with the necessity of an affidavit. In the former case, the *whole* statutory machinery for taking depositions is dispensed with, and required to be waived; in the latter case, only a *part* of it.

3. It is insisted, however, that the record shows that the appellant *objected* to accepting the *continuance* on the terms imposed. We do not so construe the record. The recital following the order of continuance is—"to which *order* defendant excepts." It is obvious that the appellant *enjoyed the benefit of the continuance*, and did not object to that; otherwise, he would have insisted on proceeding with the trial of the cause. His exception, according to a well settled rule, must be most strongly construed against him, as the excepting party. It must be taken as an acceptance of the continuance, with an objection to the *terms* imposed. This was not permissible. The enjoyment of the benefit of the order as made, was an acceptance of the condition with which the court saw fit to burden it. The two should have been accepted or rejected as an entirety, and this course does not seem to have been followed.

4. It is an established rule of evidence, that while, in ordinary cases, the mere *declarations* of a person as to a particular

[Humes v. O'Bryan & Washington.]

fact are not evidence of that fact, being regarded as hearsay; yet declarations made by a person which are *at variance with his pecuniary or proprietary interest*, are admissible in evidence of their own truth, under certain circumstances. These conditions are, that the declarant possessed competent *knowledge of the facts*, and is *deceased* at the time his declarations are proposed to be proved. The absence of any motive of a pecuniary nature, which would tempt him to falsehood, creates a strong and intrinsic probability of the truth of his declaration; and it is, therefore, admitted as secondary evidence, after the death of the declarant, being the best which the nature of the case will, under the peculiar circumstances, permit.—1 Greenl. Ev. § 147; Starkie's Ev. (Shar.) 64; *Higham v. Ridgway*, 2 Smith's Lead. Cases, 183; 1 Whart. Ev. § 226, *et seq.* The weight and value of such evidence depends, of course, upon many considerations of a variable character.—*Raines v. Raines*, 30 Ala. 425.

5. We are of the opinion that the declaration of Glover, testified to by the witness Gordon in his deposition, comes within the class of declarations against interest, under the principle above announced. Glover's declaration was, that the appellant, Humes, was *never* his partner, except in the planting business; and this statement appears to have been made with special reference to the pecuniary liability of the parties on the claim which is the basis of the present suit. The death of Glover was proved, and it was shown, furthermore, that there were no assets of the alleged mercantile partnership of Glover & Humes, the reputed firm, *as such*, being regarded as *insolvent at the time of Glover's declaration*. This fact, it must be noticed, is of vital importance as affecting the question of interest. In the absence of the fact of *insolvency*, it is manifest that the converse proposition—that Humes *was a partner* of the declarant—would be a declaration against his interest. This is so because, if true, it would entitle Humes to a half interest in the partnership assets belonging to the alleged firm of Glover & Humes. The assertion, therefore, that Humes was *not* a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's liability, by destroying his right of recourse against Humes for any portion of the debts due by the reputed firm. 2 Whart. Ev. § 1200.

6. There is another not less familiar rule of evidence, applicable to a large number of the rulings of the court below. It is, that the declarations of one in possession of property, *explanatory of the possession*, made in good faith, and showing the character or extent of his claim to it—whether in his own

[Humes v. O'Bryan & Washington.]

exclusive right, or as tenant of another; or the capacity in which he claims, as partner, trustee or agent for another—are admissible in evidence, in an issue of disputed ownership, no matter who may be parties to the litigation.—*Daffron v. Crump*, 69 Ala. 77; *Clealand v. Huey*, 18 Ala. 343; 1 Brick. Dig. p. 843, § 558; *Thomas v. Wheeler*, 47 Mo. 363. The theory, upon which the law admits such declarations, is, that they are a part of the *res gestæ* of the possession itself; such possession being the principal fact, and itself *prima facie* evidence of ownership in fee simple.—1 Greenl. Ev. § 109; *Perry v. Graham*, 18 Ala. 822; 2 Whart. Ev. § 1166. Of course, in all such cases, the fact of possession should itself be admissible as one pertinent to the issue.—*Fail v. McArthur*, 31 Ala. 26.

7. Under the influence of this principle, it is our opinion that the various acts and declarations of Glover, while in possession of the goods, and carrying on the alleged partnership business at the store in Morgan county, were admissible, so far as they were explanatory of his possession, as indicating whether the goods were his own individually, or were claimed jointly by him as partner of another person. Hence, it was admissible to show that, while in actual possession of the alleged partnership assets, he declared that they belonged to him, or to himself and Humes as partners, as the case may have been; or that he conducted the business in the partnership name, or under a partnership license; or that he sold spirituous liquors in his own name, if they constituted ostensibly a portion of the stock of merchandise in the store; or that he sued in his own name to recover the debts due the concern; or, in fine, to prove any act or declaration on Glover's part, illustrating the nature or character of his dominion over the goods, or control of the store, whether for himself exclusively, or as partner with Humes. These acts and declarations all constituted a part of the *res gestæ* of the possession itself, throwing light upon, and characterizing its very nature. As such, they are admissible in evidence, when the principal fact of Glover's possession is itself admissible, as to which there is no contention. They can not be said to be evidence against the defendant, Humes, of the *existence* of the partnership in question, unless some notice of them was brought to his knowledge; but they are relevant to corroborate, or rebut, as the case may be, other evidence offered to prove the existence or non-existence of such a relationship. The weight and sufficiency of such evidence will be more or less conclusive, according to the circumstances of the entire case; but this is a question for the jury. It is easy to see, without specific mention, what parts of the testimony of the witnesses, James and McClellan McCutchen, were improperly excluded by the court under this rule.

[Humes v. O'Bryan & Washington.]

8. It was very clearly not competent to prove the existence or non-existence of the alleged partnership by general reputation. *Hogan v. Douglass*, 2 Ala. 499. Nor could the character of Glover's possession be proved by any general understanding in the neighborhood.—*McCoy v. Odom*, 20 Ala. 502; 1 Brick. Dig. 847, § 608.

9. The rule is settled, however, that when once a partnership is shown to exist by independent testimony, it is then competent to prove a general reputation or common report of its *existence*, in order to impute a probable *knowledge* of such fact to a plaintiff. And for a like purpose, the notoriety of a *dissolution* may be shown to charge one with notice of such fact. Perhaps the same rule might apply, as contended, to the *non-existence* of a partnership in certain cases. The reason of the rule is obvious. It is based upon the probability that the plaintiff would be likely to know a fact of which no one else in the neighborhood seemed to be ignorant. It should, in our opinion, have no application to persons living at a distance in another State, unless they are shown to have had an opportunity of hearing the common report by frequently visiting the residence of the alleged partners, or otherwise. The prevalence of a local rumor in a country neighborhood in Alabama, without more, would afford no reasonable ground of inference that it was known to the mercantile community of a distant city in Tennessee. What the witness Jamar is shown to have said to the plaintiff, in Nashville, had no reference to any common fame touching the existence or non-existence of the disputed partnership.

10. So, we may further add that, generally speaking, the declaration or act of one partner, not in the presence of his co-partner, as above intimated, is not competent evidence to establish the fact of an existing partnership between them, unless such declaration be one against interest made by one deceased, or fall within some other recognized exception to the rule excluding hearsay evidence.—*Clark v. Taylor & Co.*, 68 Ala. 454. But, as we have sought clearly to indicate above, the declarations of one partner, strictly explanatory of possession, whether against interest or not, within the above rule, are admissible in corroboration of other and independent evidence of an alleged partnership.

11. Under these principles, the letter signed by Glover, in the name of Glover & Humes, dated February 20, 1872, was admissible; also, the mortgage from Williams to Glover, if it was given to secure a debt for goods purchased from the store during the time the business was conducted by Glover. So, it is equally manifest that the note given by Humes to Ewing, and the receipt given by the latter, on account of

[Humes v. O'Bryan & Washington.]

mules purchased for Glover, were inadmissible. Nor can we see that there was any error in the exclusion of what was proposed to be proved by Taylor, the circuit clerk, in reference to defendant's efforts to procure Ledbetter's testimony; nor, again, of so much of James McCutchen's testimony as related to the settlement between Humes and Glover in reference to the crop grown on the Chapman place in the year 1872. And we are also of opinion that there was no error, under the facts of this case, in excluding proof of the alleged existence of a common report in the neighborhood that Humes and Glover were not partners. The court erred, however, for the reasons above stated, in excluding so much of the witness Harrison's testimony as related to Glover's declaration that the stock of goods in the store were his own, and did not belong to Glover & Humes. But Glover's statement as to where, or on whose account, he had purchased the goods, or any portion of them, being merely narrative of a past transaction, was properly excluded, as also his declaration of inability to induce Humes to become his security in order to borrow money from the witness Harrison.

12. It is unnecessary for us to consider whether Glover and Humes were partners *inter se* in the business of farming, under the stipulations of the written contract shown to exist between them. It is clear that this relation could not be held to exist, unless these articles be construed to embrace an agreement for a community of *risks*, as well as for a distribution of *gains*.—*Mayrant v. Marston*, 67 Ala. 453. However this may be, the existence of a partnership for the purpose of farming would not, of itself, authorize the carrying on by one partner, in the firm name, of a store for the sale of merchandise; for this would be a mercantile partnership, not necessarily or usually incident to the business of farming.—*McCreary v. Slaughter*, 58 Ala. 230; Story on Part. §§ 111–113, 126.

13. This observation is applicable, only so far as concerns the effort on the part of the plaintiffs in this action to fasten a liability upon Humes, based on the theory of his being an actual partner of Glover. It does not affect the question of liability which may have arisen from the alleged fact that Humes permitted the mercantile partnership to be carried on in his name. It is well settled that, although no partnership may exist, yet where one, either expressly or by culpable silence, permits himself to be held out as a partner, and debts are contracted on the faith of this fact with third persons, he will be held responsible for debts contracted with such persons, if they deal with the alleged firm in ignorance of the true relationship of its members.—*Parsons* on Part. 71, 412–13; 2 Greenl. Ev. § 283; *Nicholson v. Moog*, 65 Ala. 471, 472.

[Humes v. O'Bryan & Washington.]

If, therefore, the jury were satisfied, from all the evidence, that the defendant, Humes, permitted the mercantile partnership to be carried on in the name of himself and Glover, it was not material whether a technical partnership existed between them in the farming business or not. The contract for farming was relevant, as affecting the business intimacy of the parties, and was admitted as one of many links in a chain of evidence bearing on the main issue in dispute.

14. It is plain that, if the jury believed the evidence as to Humes' alleged failure to answer the letters written to him by the plaintiffs, in which they treated the firm of Glover & Humes as an existing partnership, and no sufficient explanation is given of such neglect, they would be authorized to treat this silence as in the nature of an implied admission that such a partnership did exist. The charge of the court may have been somewhat misleading, in the use of the word *negligence* in this connection, instead of *failure*, or *neglect*. So, it should have been submitted to the jury, as a question of fact, whether there was such an admission by the defendant, this being disputed.

15. It is contended by the appellant, that the telegrams which were introduced in evidence were written instruments, and constituted the contract between the plaintiffs and the defendant, Humes, provided the jury concur in the belief that the one which Richardson sent was transmitted by Humes' authority. It is, therefore, insisted that they should have been construed by the court, and not by the jury. This would undoubtedly be true, if the telegrams in question had passed between the parties to this suit, and had been introduced in evidence to prove a contract between them, which was sought to be made the basis of a liability. Such, however, is not the case. The telegrams passed between other parties, and are not introduced to prove a contract between the parties to the present suit. The purpose of their introduction was to show, in connection with other explanatory evidence, that it was believed by certain parties in Nashville that there was such a mercantile firm in Alabama as Glover & Humes; that the plaintiffs reasonably participated in this belief, and were encouraged by Humes in selling goods on the faith of it to the reputed partnership; or, in other words, that Humes permitted himself to be held out as a partner of Glover in the business of merchandising. It is clear that the plaintiffs derived no technical *authority* from Richardson's last telegram, directed to Wright, Hooper & Co., and saying, "Sell small bill, and on short time;" by which they would be specifically empowered to extend a like credit, even though this dispatch was transmitted by consent of Humes. But it is equally clear that, upon seeing this telegram, they would be authorized to infer that Richardson's

[Humes v. O'Bryan & Washington.]

intention was to revoke his first telegram, which disclaimed all knowledge of the existence of the firm or partnership inquired about, and to impliedly assert the fact of its existence.

16. The court also properly submitted to the jury the inquiry, as to whether or not the telegram from Nashville did not have reference to Glover & Humes, instead of Glover & Hemm, a suggestion which there was evidence tending to prove. It can not be said, as implied in the last clause of the second charge requested by defendant, that the plaintiffs had no right to rely or act upon the information derived through the medium of these dispatches. There was no error in refusing to give the first three charges, nor the last charge, numbered five, requested by defendant. So, the fourth charge was erroneous under the principles heretofore discussed.

17. It was improper for the court to assume, as seems to have been inadvertently done in a portion of the general charge, that the defendant had made an *admission* of the existence of the alleged partnership. This was a contested fact, and should have been left to the jury.

18. It is quite clear that no restrictions placed by Humes upon Glover's authority to purchase any thing in carrying on their farming operations could affect the plaintiffs in this action, unless it was shown to have been brought home to their knowledge, in which case it might be relevant to put them on inquiry as to the relations of the alleged partners. If the defendant allowed Glover to carry on a store in his name, either expressly or by culpable silence, and the plaintiffs gave the alleged firm credit on the faith of this fact, it would be immaterial what restrictions had been placed upon Glover's authority by private agreement, if the plaintiffs were not cognizant of them; and the *onus* would be on the defendant to show that they were, if the contract sued on be one presumptively within the scope of a partnership carrying on such a mercantile business, of which latter proposition there would seem to be no doubt.

For the errors above specified, the judgment must be reversed, and the cause remanded. We can see no error in the other rulings of the court than those above indicated, and the various assignments based on them are accordingly overruled.

Reversed and remanded.

[Jordan v. Ala. Great Southern Railroad Co.]

Jordan v. Ala. Great Southern Railroad Co.

Action for Malicious Prosecution.

1. *Action lies against corporation.*—An action on the case for a malicious prosecution may be maintained against a corporation. (The case of *Owsley v. M. & W. P. Railroad Co.*, 37 Ala. 360, on this point, is against the weight of more recent decisions, and is overruled.)

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. LEROY F. BOX.

This action was brought by Jule L. Jordan against the appellee, a domestic corporation, to recover damages for an alleged malicious prosecution; and was commenced on the 10th April, 1882. The complaint contained two counts, each of which averred, in substance, that one William Lively, "who was a section boss on defendant's railroad in said county of St. Clair, and whose duty and business it was, under said employment, to act as agent for said defendant, in looking after its interest and repairing a certain portion of its said road," "while acting in the line and scope of his authority, as such agent, and at the instance of said defendant, and by its authority," caused plaintiff to be arrested and imprisoned, "by appearing before E. J. Robinson, the judge of the County Court of said county, and falsely and maliciously making an affidavit accusing plaintiff of a felony under the laws of Alabama, to-wit, of wantonly or maliciously injuring or obstructing the railroad which defendant was then operating;" that by reason of said false and malicious affidavit, "so made by defendant's said agent, at the instance, and by the authority of said defendant," a warrant of arrest was issued against the plaintiff, and he was arrested and brought before the judge of said County Court, and, after being imprisoned two days and nights, was tried and acquitted; that the defendant, "knowing the charge to be false and unfounded, and that there never was probable cause for said affidavit and warrant, or for believing that plaintiff was guilty of said charge," employed counsel to appear against plaintiff and prosecute him; that the prosecution was ended, &c. The defendant demurred to the entire complaint, and to each count separately, assigning several special causes of demurrer, each of which was, in substance,

[Jordan v. Ala. Great Southern Railroad Co.]

that an action for a malicious prosecution would not lie against a corporation, and that the defendant was not liable for the malicious acts of its agents or servants. "Upon due consideration whereof," as the judgment-entry recites, "it is ordered by the court that said demurrer be sustained; to which the plaintiff objected and excepts. And the plaintiff declining to further prosecute this suit, it is therefore considered by the court, that the defendant go hence, and recover of the plaintiff his costs in this behalf expended," &c. The judgment sustaining the demurrer is now assigned as error.

D. T. CASTLEBERRY, for appellant.—To say that a corporation aggregate can not have motives, and can not act from motives, is to deny the evidence of our senses. Every day's experience shows us that they are acting continually from various motives, making powerful combinations, exercising prudence and foresight in their calculations, and achieving wonderful results. If they can have any motive, it may be bad as well as good; and if they reap the beneficial results of their acts, they should be responsible for the injurious results to others. A corporation necessarily acts through agents, and should be held responsible for the acts of its agents, just as a private person is. The current of modern authorities, both text-writers and judicial decisions, is against the technical rule which formerly prevailed to a limited extent, and holds that an action for a malicious prosecution may be supported against a corporation, under the averments found in this complaint. *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Vance v. Erie Railroad Co.*, 32 N. J. Law, 334; *Williams v. Pl. Insurance Co.*, 37 Miss. 759, or 34 Amer. Rep. 494; 22 Howard, 202; 9 Phil. Penn. 189; *Carter v. Howe Machine Co.*, 51 Md. 290; Cooley on Torts, 121; 2 Wait's Ac. & Defenses, 337; Field on Damages, §§ 81-86, and authorities cited.

RICE & WILEY, INZER & GREEN, and J. J. GARRETT *contra*, cited *Owsley v. M. & W. P. R. R. Co.*, 37 Ala. 560; *S. & N. Railroad Co. v. Chappell*, 61 Ala. 527; 3 Wait's Ac. & Defenses, 322, § 15. And they contended, also, that an appeal does not lie from a judgment of nonsuit, such as was entered in this case; citing, to this point, *Palmer v. Bice*, 28 Ala. 430; *Vincent v. Rogers*, 30 Ala. 471; *Rogers v. Jones*, 51 Ala. 353; 52 Ala. 285; 1 Tidd's Practice, 460, 481, 3d Amer. ed.

BRICKELL, C. J.—The judgment of the Circuit Court, sustaining the demurrers to the complaint, was doubtless in obedience to the decision in *Owsley v. M. & W. P. R. R. Co.*, 37 Ala. 560, that while an action of trespass for false impris-

[Jordan v. Ala. Great Southern Railroad Co.]

onment may be maintained against a corporation aggregate, an action on the case for a malicious prosecution can not be supported. The distinction between the two actions, which embodies the reason of the decision, then supposed to rest on the weight of authority, is thus stated: "The distinction seems to be between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them, and conduct the character of which depends upon the motive, and which, apart from such motive, can not be made the ground of legal responsibility." There are not wanting authorities taking the like distinction, affirming that, as a corporation "is an artificial being, invisible, intangible, and existing only in the contemplation of law," to which the law can not impart *animus*, passion, or moral quality: which is incapable of the commission of an offense, deriving criminality from an evil intent, or consisting in a violation of social duty, it can not be subjected to a civil action of which an essential, distinguishing element is *malice*, or a mischievous purpose or motive. The current of authority now is, that corporations are responsible, civilly, the same as natural persons, for wrongs committed by their officers, servants or agents, while in the course of their employment, or which are authorized, or subsequently ratified.—Ang. & Ames Corp. §§ 385-89; Morawetz on Private Corporations, §§ 89-96; Cooley on Torts, 119-23; *S. & N. R. Co. v. Chappell*, 61 Ala. 527.

The immunity from individual liability afforded by corporate organization; the capacity for the concentration and employment of intelligence, energy and capital, without break or interruption because of changes in membership, has led to the multiplication of corporations, until there is scarcely an object of general concern a corporation is not formed to promote, and to a great extent they have engrossed business in all hazardous enterprises, or enterprises requiring the investment and use of large capital. "With the multiplication of corporations," said Rogers, J., in *Bushel v. Com. Ins. Co.*, 15 Serg. & R. 176, "which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them;" and he adds: "The change in the law has arisen from a change of circumstances—from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome because it is gradual and wisely adapted to the peculiar situation, wants and habits of our citizens." And in *P., W. & B. R. R. Co. v. Quigley*, 21 How. (U. S.) 210, Mr. Justice Campbell said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their

[Jordan v. Ala. Great Southern Railroad Co.]

governing body and their agents, with the natural persons with whom they are brought into contact or collision." It is the aim and the duty of courts to apply principles of the common law, with such modifications as are necessary to adapt them to the changed necessities, varied social conditions and diversified business and interests of the community. Perhaps, there is not, in the history of the common law, more distinctive evidence of its modifications, of the rejection of its narrow technicalities, than in the adaptation of the legal relation of corporations to a just liability for the acts, omissions, or engagements of the governing body, or its agents, or servants, employed in the transaction of corporate business. The ancient rule, that they could speak and act only through the common seal, is obsolete; and now they are bound by the like implications and inferences which bind natural persons. The technicality, that an action of trespass would not lie against a corporation aggregate, because the process proper in such action—a *capias* and *exigent*—could not issue, has almost disappeared from the books. Referring again to the case of *P., W. & B. R. R. Co. v. Quigley*, *supra*, we quote the words of Mr. Justice Campbell: "To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body, selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are connected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives. . . . The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." This is admitted to be the result of the authorities in *Owsley v. M. W. P. R. R. Co.*, *supra*, subject to the limitation, that as the corporation is incapable of malice, it is not liable for torts of which malice is an essential element. .

The idea that a corporation is not liable for a tort involving a malicious intent, had origin in the day when it was denounced as soulless, and was an application of the quaint syllogism ascribed by Lord Coke to Chief Baron Manwood, that "None

[Jordan v. Ala. Great Southern Railroad Co.]

can create souls but God ; but a corporation is created by the King ; therefore a corporation can have no soul,"—from which was deduced the conclusion that it could do no wrong. There was a reluctance to look beyond legal entity, to the natural persons, its constituent members, or to the agents or servants, through whom its faculties were exercised and its legal existence kept alive. To the mere legal entity, motive, good or evil, can not be imputed, but is imputable to its representatives ; and as the corporation derives benefit from the representation, there is but little of justice in a claim of exemption from the responsibilities it may involve.

We have among us not only purely domestic corporations, but corporations existing by the separate authority of several States, drawn into the daily transaction of business with all classes of the community, holding property of every species under the protection of the law of the State, compelled to a frequent resort to the courts for prevention or redress of injuries. Foreign corporations, by a liberal comity, here exercise corporate power, transact business, hold and enjoy property. It is by the representation of natural persons that their franchises are exercised, their business transacted, and property acquired. It would not be just, if a natural person suffer wrong from the malicious acts of the representative of a corporation, while within the scope of his employment, for the courts to refuse to look beyond the legal entity, to its real and true character, an association or aggregation of natural persons, capable of acting by a corporate name, and in continuous succession. This is not unjust to the corporation, for it "tends to induce greater care and caution in the selection of those who are to be intrusted with corporate affairs." The same reasons that render a corporation responsible for any tort committed by its agents, if we do not resort to the technicality that it is incapable of motive, will render it liable for a malicious prosecution.—*Green v. Omnibus Co.*, 7 Com. Bench, N. S. 290 ; *Goodspeed v. East Haddam Bank*, 32 Conn. 530 ; *Carter v. Howe Machine Co.*, 51 Md. 290 ; *Wheless v. Second Nat. Bank*, 1 Baxter, Tenn. 469 ; *Jefferson R. R. Co. v. Rogers*, 29 Ind. 7 ; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505 ; *Vance v. Erie R. R. Co.*, 32 N. J. Law, 334 ; *Williams v. Planters' Ins. Co.*, 57 Miss. 759 ; *P., W. & B. R. R. Co. v. Quigley*, 21 How. U. S. 202. We feel constrained upon this point to depart from the decision first referred to, in *Owsley v. M. & W. P. R. R. Co.*, 37 Ala. 560. This conclusion is decisive of the case, as now presented ; and we purposely abstain from any discussion of the facts and circumstances which must concur to fix upon a corporation liability for tortious acts of its servants or agents.

[Tabor v. Peters.]

The Circuit Court erred in sustaining the demurrers to the complaint, upon the specific ground, that an action on the case for malicious prosecution will not lie against a corporation.

Reversed and remanded.

Tabor v. Peters.

Action on Promissory Note, by Payee against Makers.

1. *Parol evidence as to warranty or fraud.*—In actions *ex contractu*, brought for an alleged breach of contract of warranty, oral proof of a warranty is not admissible; but, where the action is *ex delicto*, based on the tort or deception practiced by the false warranty, the rule is otherwise, and parol evidence is admissible to show that the contract was induced by an oral warranty, which was known by the party making it to be false, and which was made for the purpose of deceiving the other party.

2. *When misrepresentations constitute fraud.*—A misrepresentation of a material fact by the vendor of a chattel, made at the time of the sale, or pending the negotiations, on which the purchaser has the right to rely, and on which he does in fact rely, is a fraud, and furnishes a cause of action to the purchaser, or a ground of defense to an action for the purchase-money.

3. *Warranty of chattel.*—No particular words are essential to constitute a warranty. As a general rule, there must be the affirmation of some fact, as distinguished from the mere expression of an opinion. Words of praise or commendation, such as are ordinarily used by the vendor of wares or chattels, however extravagant, impose no liability, either in the nature of a contract, or as a fraud; but a false statement, deliberately made, though in the form of an opinion, as to the quality, quantity, or condition of the thing sold, may amount to a warranty, if so intended and understood by the parties; and what would be mere matter of opinion, when spoken by a non-specialist, may be matter of fact when spoken by a specialist.

4. *Same.*—A warranty, express or implied, does not cover defects which are external and visible, plain and obvious to inspection by the eye; but, even as to such defects, "the vendor would be guilty of a fraud, if he says or does any thing whatever with an intention to divert the eye, or to obscure the observation of the buyer."

5. *Same; what are patent defects.*—On the sale of a patent right to an improved churn, which the vendor himself was manufacturing, and a specimen of which he exhibited to the purchaser, stating that it was made of juniper-wood (whereas it was made of white pine), and that the dasher was nickel-plated, and would not discolor the milk or butter (whereas it was in fact made of polished iron, which would discolor the milk and butter); the court can not say that the difference in the appearance of these substances is so plain and obvious as to bring the case within the principle applicable to patent defects.

6. *Implied warranty as to suitability of chattel manufactured by vendor.*—The vendor of the patent right being himself the manufacturer of the patented churn, and contracting to furnish to the purchaser a sufficient number of the churns, he must be held to have stipulated that they were useful and reasonably suitable for the intended purpose; and if

[Tabor v. Peters.]

they proved to be worthless in fact, this would be a failure of consideration, resulting from the breach of the implied warranty, and available as a defense against the note given for the purchase-money.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

This action was brought by Thomas H. Tabor, against William M. Peters and James M. Peters; was commenced on the 14th April, 1883, and was founded on the defendants' two promissory notes, for \$75 and \$50 respectively, each dated June 2d, 1882, and payable on the 1st October next after date, to the plaintiff or bearer. The defendants pleaded, "in short by consent, 1st, *non assumpsit*; 2d, want of consideration; 3d, failure of consideration; 4th, that the consideration of said notes was the sale of a patent right which is worthless and not such as represented by plaintiff, and said plaintiff practiced a fraud on the defendants, and the said notes are without consideration; 5th, breach of warranty of the article sold." Issue was joined on all these pleas. On the trial, as the bill of exceptions shows, the plaintiff read in evidence the two notes sued on, neither of which expressed the consideration on which it was founded; and he also read in evidence the letters patent issued by the United States to Abijah Johnson for "an improved churn," an assignment of said letters patent by said Johnson to plaintiff, and a written contract dated June 2d, 1882, by which plaintiff transferred to said defendants, "in consideration of the sum of \$125 in hand paid," the said patent right and all interest under it in and for the county of St. Clair, Alabama. One of the defendants was then introduced as a witness for them, and "was asked to state whether said Tabor made any representations to him, in regard to the quality and value of the churn, before he purchased the right to sell said churns." Said witness stated, in reply, that said Tabor represented and told him, that the churn would churn in from three to five minutes; that it was made of juniper-wood; that the plunger-rod was nickel-plated, and would not corrode or color the milk or butter; that a child five or six years old could churn on it with ease, and that it would last twenty years. The witness said, that on these representations he purchased the right to sell said churn in St. Clair county, and executed the notes sued on in consideration thereof; that he discovered, after he had purchased the churn, that it was made of white pine, the top of poplar, and that the rod was not nickel-plated; that after using it a day or two it would corrode or color the milk and butter; that it was too heavy to be operated by women or children; that it would warp, when not in use, so that the top would not fit, and when in use the top would swell, and become so tight it had to be prized off.

[Tabor v. Peters.]

The plaintiff objected to the above evidence of said Peters, on the ground that it was illegal, irrelevant, and incompetent;" and he also objected to the question on the same grounds, and duly excepted to the overruling of his objections.

"Said witness testified, also, that plaintiff informed him, at the time of said purchase, that the churns were made at his manufactory in Cincinnati, Ohio, and could only be procured from his factory, and could be laid down in Talladega at \$2.50 per churn, and agreed to give him printed orders for said churns, and without which orders (he said) witness could not procure any churns. Witness was a farmer, and said Tabor was a manufacturer of churns, and was familiar with patent churns. The defendant's evidence further showed, that he procured some twenty churns from said Tabor, ordered in conformity to his directions from his factory in Cincinnati, at \$2.50 each laid down in Talladega. Witness purchased the churns for juniper churns, and afterwards found them to be of ordinary white pine. The evidence further showed that said Tabor had all of his churns made of white pine, and never had manufactured any juniper churns, and had never seen a juniper churn; and that the churns purchased of said Tabor were not nickel-plated, but the plunger-rod was of polished iron. Said witness stated, on cross-examination, that when he called on said Tabor, at the hotel in Talladega, and proposed to purchase said county right, said Tabor had a sample churn with him, and showed him the churn and its mode of operation; that he inspected said churn, and found it to be painted outside, but not inside; that the rod was exposed, and he inspected it; that the churns which he purchased from plaintiff's factory were like the said churn so showed him. He stated, also, in rebuttal, that he told plaintiff's attorney in this case, before the suit was brought, that the churn was not as represented by plaintiff, and that he would not pay for it, and that he offered to rescind the contract." Another witness for the defendants, who was present at the time the contract between the parties was made, testified to the plaintiff's representations as above stated; and exception was duly reserved by the plaintiff to the admission of this evidence. Several witnesses for the defendants testified, in substance, that the churns were too heavy to be operated by women and children, and that the butter and milk was discolored. The plaintiff reserved exceptions to the admission of this evidence, and he introduced several witnesses who testified, in substance, that the worth and capacity of the churn were equal to the representations made respecting it.

The bill of exceptions purports to set out all the evidence introduced on the trial, the substance of which is above stated. On this evidence, the court refused the following charges,

[Tabor v. Peters.]

which were asked in writing by the plaintiff: 1. "If the defendant inspected the churn, and the one inspected is just like those used and sold, then the defendant can not set up fraudulent representations, to prevent paying the notes sued on." 2. "The defendant can not set up fraud as a defense to this action, if he inspected the churn before purchasing it." 3. "If the jury find, from the evidence, that said defendant had an opportunity to inspect the churn before he purchased it, and that plaintiff did not make any representations to prevent him from making an inspection, defendant can not set up fraud to prevent paying the notes sued on." The plaintiff excepted to the refusal of each of these charges, and also to each of the following charges, which the court gave at the request of the defendants:

"1. If plaintiff represented that the churn would not rust, corrode or discolor the milk or butter, and it is shown that such representations materially influenced Peters in making the purchase, and such representations are shown to be false; then such statements would be a fraud on Peters, and would authorize him to repudiate the contract.

"2. If Tabor, at the time of the sale, represented that Peters could procure the patent churn, made of juniper-wood, from the manufacturer in Cincinnati, Ohio, for \$2.25; and that this statement was false, and the churn manufactured by said Tabor was made of soft-pine wood; and that juniper churns could not be procured for that price, in Cincinnati or elsewhere; and that such representations materially induced the purchase,—such statement would be a fraud on Peters, and would authorize him to repudiate the sale and refuse payment.

"3. A manufacturer of articles for a special purpose, when that article is sold for such purpose, is held to have stipulated that it is useful and adapted to that purpose; and if the article so manufactured and sold is worthless, or is not useful for the purpose for which it was manufactured, then the vendor manufacturer has broken his contract, and the purchaser may renounce the contract, and refuse to receive the article; or, if he has received it, and afterwards learned its worthlessness, he may refuse to pay for it.

"4. In determining whether or not any fraud was accomplished, or whether the parties to the contract dealt on equal terms, the jury may look, in connection with the other evidence, to the opportunities of the parties for knowing the character and material composing the churn; and if the evidence shows that plaintiff was engaged in manufacturing the churns sold, and was intimately acquainted with the material out of which the churn was made; and that Peters was a farmer, and not

[Tabor v. Peters.]

acquainted with the material out of which the churn was made; then Peters might rely upon the truth of Tabor's statement as to the materials of which the churn was made; and if such representations are shown to have been willfully false, they would be a fraud on the purchaser, and would authorize him to repudiate the contract.

"5. If plaintiff stated to Peters that the churn could only be procured from one manufacturer in Cincinnati, and that juniper churns could be procured from said house at \$2.25; and that this statement is shown to have been false, and juniper churns could not be had for that price, and the statement materially induced the purchase; then it would be a fraud on Peters, and would authorize him to refuse to pay for the patent right purchased.

"6. If Tabor made misrepresentations as to the qualities and merits of the churn sold, and these representations materially induced the purchase, then it is not necessary to show that the patent is absolutely worthless, but it is sufficient to show that the representations were false, and the purchaser was thereby deceived; and if the churn was not such as represented, and the purchaser was deceived by the false representation of the vendor, the purchaser would be authorized to repudiate the contract, and to refuse payment."

The rulings of the court on the evidence, the charges given, and the refusal of the charges asked, are now assigned as error.

D. T. CASTLEBERRY, for appellant.—(1.) The objections to evidence were well taken.—*Davis, Moody & Co. v. Betz & Cullman*, 66 Ala. 206; *Townsend & Milliken v. Cowles*, 31 Ala. 428; s. c., 37 Ala. 77; *Green v. Casey*, 70 Ala. 417; *Cargile v. Ragan*, 65 Ala. 281; 3 Wait's Actions & Defenses, 556. (2.) The charges refused should have been given.—*Barnett v. Stanton*, 2 Ala. 181, 195.

BOWDON & KNOX, *contra*. (No brief on file.)

SOMERVILLE, J.—The suit is on certain promissory notes, given by defendants to plaintiff for an interest in a patent right to what was alleged to be an improved churn, the territory included in the purchase being confined to the county of St. Clair, in this State. The defense set up is based on certain statements made by the plaintiff, as inducements to the purchase, relating to the qualities and capacities of the patented article, which are alleged to have been false, and fraudulently made; and want of consideration and failure of consideration are also pleaded.

It is shown that the plaintiff, Tabor, was himself engaged in
VOL. LXXIV.

[Tabor v. Peters.]

the manufacture of these churns, and at the time of the negotiation he made this fact known to the defendants, and exhibited to them a sample or specimen of his patented invention. The representations alleged to have been made by him at the time are, that the churn would produce butter in from three to five minutes; that it was made of juniper-wood; that the plunger-rod was nickel-plated, and would not corrode or discolor the milk and butter; and that a child, five or six years old, could operate it with ease. The evidence tended to show that these statements were untrue—that it would not produce butter in less than ten minutes; that the body of the churn was made of white-pine, and the top of poplar-wood; that it was too heavy for use by women or children, requiring the strength of a man to operate it; and that the rod was not nickel-plated, but was made of polished iron, and would corrode or discolor the milk and butter, to such extent as to render the invention entirely worthless. The sample churn exhibited by plaintiff was painted on the outside, and was inspected by one of the defendants.

It was objected in the court below, that the evidence offered by the defendants as to the foregoing statements was inadmissible, because the contract of sale was in writing; and that its tendency was to vary the terms of the writing, by superadding a verbal warranty of the article sold, when none was contained in the contract itself. In all cases where the action is *ex contractu*, brought for an alleged breach of a contract of warranty, this is undoubtedly the rule. Oral proof of a warranty is inadmissible in this class of cases, because its effect is clearly to vary the terms of the written instrument, by superadding another term or condition not expressed by the parties. 1 Parsons Contr. *589-590. But the rule is otherwise where the action is *ex delicto*, based on the *tort* or deception practiced by the false warranty. Parol evidence is always admissible, to show that a contract was induced by "an oral warranty made by one of two contracting parties, which was false to the knowledge of the party making it, and was made for the purpose of throwing the other contracting party off his guard, and fraudulently obtaining his consent to the bargain."—1 Addison Contr. § 629. Such false representations are entirely collateral to the contract; and when made as an inducement to procuring its execution, they constitute a fraud, which vitiates its legal validity, so far, at least, as to render it voidable at the option of the party defrauded, seasonably expressed upon the discovery of the fraud.—*Nelson v. Wood*, 62 Ala. 175; *Blackman v. Johnson*, 35 Ala. 252; 1 Greenl. Ev. § 284.

The settled rule as to the nature of the representations which will avoid a contract of sale is well stated in the case of *Sledge*

[Tabor v. Peters.]

v. Scott, 56 Ala. 202. The rule, as there announced, is, that "a misrepresentation by a vendor of chattels, of a material fact, made at the time of, or pending the negotiation for the sale, on which the purchaser has the right to rely, and in fact relies, is a *fraud*, furnishing a cause of action to the purchaser, or a ground of defense to an action for the purchase-money." Benj. on Sales (3d Ed.), § 454; Story on Sales, § 165.

No particular words are essential to constitute a warranty. As a general rule, there must be the affirmation of some *fact*, as distinguished from the mere expression of an *opinion*. Words of praise or commendation by a vendor, such as are ordinarily used by honest tradesmen, as arts of persuasion to induce purchase, are deemed insufficient. They fall within the maxim, *Simplex commendatio non obligat*, and however extravagant, they do not in law impose a liability, either in the nature of contract or of tort.—*Farrow v. Andrews & Co.*, 69 Ala. 96; 1 Parsons' Contr. *579–581; 2 Brick. Dig. p. 408, §§ 75–78. A false statement, however, when deliberately made, although in the shape of an opinion, as to the quality, quantity or condition of the article sold, may often be construed to be a warranty, if it be so intended and understood by the parties.—1 Whart. Contr. § 259; *Barnett v. Stanton*, 2 Ala. 181. In *Wilcox v. Henderson*, 64 Ala. 535, it was said that "to constitute expressed *opinion* a ground, or instrument of fraud, it must be knowingly false, made with intent to deceive, and must be accepted and relied on as true." In determining the question of intention, which is generally one for the jury, at least in cases of doubt, a decisive test is, as suggested by Mr. Benjamin, "whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an *opinion* or judgment, upon a matter of *which the vendor has no special knowledge* and on which the buyer may be expected also to have an opinion, and to exercise a judgment. In the former case there is a warranty, in the latter not." Benjamin on Sales (3d Ed.), § 613; *Kenner v. Harding* (85 Ill. 264), 28 Amer. Rep. 615. And "what would be matter of opinion," says Mr. Wharton, "when spoken by a non-specialist, may be a matter of fact when spoken by a specialist."—1 Whart. Contr. §§ 259–260.

There are many adjudged cases illustrating these principles in their application to the sale of patented rights and inventions. It has been said generally, that statements made by vendors, as to the utility of such patents, are considered matters of opinion, while those having reference to their practical capacity and characteristics are deemed matters of fact (1 Whart. Contr. § 259); a proposition which can not be taken to be universally accurate, many cases being dependent upon their

[Tabor v. Peters.]

own peculiar surroundings. It has been held in an English case, that a statement to a farmer by a vendor, who was the patentee's agent for the sale of an agricultural machine, known as "Wood's Patent Reaper," that it would "cut wheat, barley, &c., *efficiently*," was not a warranty, but a recommendation. *Chalmers v. Harding*, 17 L. T. N. S. 571. In *Elkins v. Kenyon*, 34 Wis. 93, the assertion by the vendor of a patented machine for elevating hay, that it would work "in all kinds of hay, grain, straw and other grass," and was "in all respects *fit for the use intended*," was decided to be a warranty. In *Nelson v. Wood*, 62 Ala. 175, where the subject of sale was the right to use a patented process for tanning leather, representations made by the vendor as to the *time* it would take, and the *quality* of the leather produced, were held sufficient to vitiate the contract of sale, on proof being made that they were false, and that the process was of no value.

The case of *Bigler v. Thickinger*, 55 Penn. St. 279, was strikingly similar to the one in hand, being a suit on a note given for a patent right for a churn. The representation made was, that it would make butter in from seven to ten minutes. One of the defenses set up being misrepresentation and fraud, the court said: "The representation of what the churn would do proved utterly false; and although this was not a warranty in itself, yet it was for the jury to say, under all the circumstances, whether it was not a false representation, knowingly and fraudulently made. The parties were not in a position of *perfect equality* to judge of the article, and hence the representation of the seller, if falsely made, would avoid the contract. The jury found the falsity of the representations, and the worthlessness of the article, and this established a good defense."

In *Rose v. Harley*, 39 Ind. 77, a false assertion made by the vendor of a patent, as to what improvements were covered by it, was held to vitiate the sale of an interest in the patent right. So, in *Allen v. Hart*, 72 Ill. 104, false assertions as to the value of the territory covered by the patent, to be included in the purchase, based upon the statement of matters of fact, within the knowledge of the vendor and not of the purchaser, were decided to be a good ground of action to recover back the consideration paid for an interest in the patent right.

The charges given by the court below, in reference to the representations made by the plaintiff, Tabor, were correct, being in full accord with the principles above stated.

It is further contended, however, that the defendant can not set up fraud as a defense to this action, based on the falsity of these representations, because he inspected the specimen or sample churn exhibited to him by plaintiff, and it corresponded

[Tabor v. Peters.]

with those manufactured by the vendor, and subsequently ordered by the defendant for sale in his purchased territory.

The rule is generally stated to be, that neither a general nor an implied warranty will cover defects which, being external and visible, are "*plain* and obvious to the purchaser" upon mere inspection with the eye.—*Livingston v. Arrington*, 28 Ala. 424; Benj. on Sales (3d Ed.), § 617; 1 Whart. Contr. § 225. It is said by Mr. Parsons, that "if there be an express warranty, an examination of samples is no waiver of the warranty; nor is any inquiry or examination into the character or quality of the things sold; for a man has a right to protect himself by such inquiry, and also by a warranty."—1 Parsons Contr. (6th Ed.), *586. Mr. Wharton observes, that warranties may be found to extend to patent defects, unless the statement made is "glaringly inconsistent" with the visible condition of things.—1 Whart. Contr. § 245. A warranty that a horse has both eyes, when he is manifestly blind, would not, it is apprehended, impose any liability.—1 Add. Contr. § 628. And, as held in an old case, "if one sells *purple* to another, and saith to him 'This is *scarlet*,' the warranty is to no purpose." It was said, that to "warrant a thing that may be perceived at sight is not good."—*Baily v. Merrell*, 3 Bulstr. 95; Benj. on Sales (3d Ed.), § 617. But, as observed by Chancellor KENT, "if the vendor says or does any thing whatever, with an intention to divert the eye, or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud."—2 Kent Com. *484-85.

It does not appear that the defects in the patented churn, shown to the defendant by plaintiff at the time of their negotiation, were of this obvious character. The churn was painted on the outside, thus concealing the nature of the material of which it was constructed; and we can not say, without proof, that the appearance of white pine and juniper-wood is so different as to be glaringly obvious to the eye, when inspected under such circumstances. The same is true as to the handle or rod, and the representations which were made touching it.

The parties to the sale, moreover, were not in a condition of relative equality touching their knowledge, or ability to judge accurately of the thing sold. The plaintiff was a specialist, or expert, being a manufacturer of such articles; and was therefore possessed of a knowledge of facts in reference to their nature, capacity and structure, of which the defendant was both actually and professedly ignorant. In such cases, the misrepresentations of the seller will the more readily avoid the contract, and many statements when made by him will be deemed affirmations in the nature of fact, although they might be construed conjectural, or matters of opinion, had they emanated

[Wolffe v. Eberlein.]

from one not enjoying such opportunities of information. Such is the rule, at least, when such assertions are shown to have been falsely made, and were material inducements to the contract.—*Bigler v. Flickinger*, 55 Penn. St. 279–283; 1 Par. Contr. *580; 1 Whart. Contr. §§ 259–60.

The evidence is clear, that a part of the inducement to the purchase by defendants of the patent right in question was the ability and readiness of the plaintiff to furnish the defendants with a supply of the patented articles. The purchase was entirely useless without it. The plaintiff being himself the manufacturer, and having contracted to supply the articles manufactured by him for a special purpose, he must be held, by implication, to have stipulated that they were useful, and reasonably suitable for the purpose for which they were furnished. If they proved to be worthless, this would be considered a failure of consideration in the contract, resulting from a breach of the implied warranty. The purchaser, in such cases, has a right to rely upon the judgment and skill of the manufacturer.—*Pacific Guano Co. v. Mullen*, 66 Ala. 582; Benj. on Sales (3d ed. Bennett), §§ 657, 661; *Snow v. The Schomacker Manufg. Co.*, 69 Ala. 111; *Hight v. Bacon* (126 Mass. 10), 30 Am. Rep. 639.

The rulings of the court are in strict conformity to the foregoing principles, and its judgment is affirmed.

Wolffe v. Eberlein.

Action on Judgment; Plea of Bankruptcy.

1. *Debt discharged by bankruptcy; how declared on.*—When a subsequent promise is made to pay a debt which has been barred by a discharge in bankruptcy, the creditor may sue directly on the new promise, or, at his election, on the original debt, and reply the new promise to a plea setting up the discharge in bankruptcy; and if the original debt was reduced to judgment before the new promise was made, he may sue on the judgment.

2. *Who is proper party plaintiff.*—A judgment is not a “contract, express or implied, for the payment of money,” within the meaning of the statute which requires an action on such contract to be brought in the name of the party really interested (Code, § 2890); and an action on it is properly brought, notwithstanding its assignment, in the name of the original plaintiff, and revived in the name of his personal representative.

3. *Promise to assignor, or his agent, for benefit of assignee.*—A new promise to pay a debt which, after having been reduced to judgment, was barred by a discharge in bankruptcy, if made to the plaintiff in the judgment, or to his agent, enures to the benefit of the assignee, and will support an action on the judgment for his benefit.

4. *Validity of limited grant of administration.*—A grant of letters of

[Wolffe v. Eberlein.]

administration, which recites that A. B. "is hereby appointed the legal administrator of the said C. E., deceased, for the special purpose of conducting a suit at law instituted by the said C. E.," particularly describing it, is not void on its face; and it is not necessary that the record should affirmatively show that there was then a vacancy in the administration.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by Mrs. Celestine Eslava, against Frederick Wolffe; was founded on a judgment for \$777, besides costs, which the plaintiff had recovered against the defendant, on the 18th March, 1868, in the City Court of Mobile; and was commenced on the 7th August, 1880. The plaintiff having died, pending the suit, her death was suggested on the record, and the action was revived in the name of George Eberlein as her administrator. After the revivor of the action, the defendant pleaded, "in short by consent, 1st, the general issue, with leave to give in evidence any matter which might be specially pleaded;" 2d, a discharge in bankruptcy, granted to the defendant on the 14th January, 1870, by the District Court of the United States at Mobile; 3d, *ne unques administrator*; and, 4th, a special plea averring that, before the commencement of the suit, Mrs. Eslava had transferred the said judgment to said George Eberlein individually, and had no interest in said judgment at the time of her death, and that the judgment had never been revived in the name of her personal representative, or of any other person. The plaintiff took issue on the first and third pleas, demurred to the fourth, and replied a subsequent promise to the second. The court sustained the demurrer to the fourth plea; and a demurrer to the replication to the second plea having been overruled, issue was joined on that replication.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence a certified transcript of the judgment on which the action was founded, which transcript was admitted by the court against the defendant's objections; and he then offered in evidence his letters of administration on the estate of Mrs. Eslava, which were granted by the Probate Court of Mobile, dated June 2d, 1881, and in these words: "Whereas George Eberlein applied to the Probate Court holden at the city of Mobile, in and for the county of Mobile, State aforesaid, for special letters of administration of the estate of Celestine Eslava, deceased; and whereas the said application was granted by order of said court, upon performing the requisites required by law, and the said Eberlein having performed the same; now, therefore, be it known, that the said George Eberlein is hereby appointed administrator of the said estate, for the special purpose of conducting a suit at law instituted by said Celestine

[Wolfe v. Eberlein.]

Eslava, in the City Court of Montgomery, in the State of Alabama, against one Frederick Wolfe, and was subsequently, in the life-time of said decedent, transferred for value to George Eberlein." The defendant objected to the admission of said letters of administration as evidence, but without stating any special ground of objection; and he reserved an exception to the overruling of his objection.

The plaintiff introduced Jules Eslava as a witness, who testified, that Mrs. Eslava died in December, 1880; that before her death, but after the commencement of this suit, she transferred said judgment to him (witness), to be by him transferred to said George Eberlein; that he did accordingly transfer said judgment to Eberlein before the death of Mrs. Eslava; that during all that period, and long before, witness was the agent of Mrs. Eslava, and defendant had told him, as many as a hundred times, that the debt to Mrs. Eslava was a debt of honor, and he had often promised to pay it;" and he detailed the particulars of a conversation between the defendant and himself, in June, 1877, at which time defendant paid him \$20 on account of the judgment, and promised to pay the entire amount in a short time. Another witness for the plaintiff, who was present at this interview, testified to the same effect in substance; while the defendant, testifying in his own behalf, denied that the \$20 was paid on account of the judgment, and denied that he had ever promised to pay the judgment after obtaining his discharge in bankruptcy.

At the request of the plaintiff, the court gave the following charges to the jury, to each of which the defendant duly excepted: 1. "If the jury believe, from the evidence, that the plaintiff's intestate recovered a judgment against the defendant in 1868; and that the defendant was discharged in bankruptcy in 1870; and that after such discharge he made an express promise to pay said judgment, then the jury will find for the plaintiff." 2. "When a person who has been discharged from a debt by bankruptcy, and relieved of its payment, makes an express promise to pay such debt, such promise revives the debt, and will entitle the owner thereof to sue on it and recover." 3. "If one man says to another, to whom he is indebted, 'You can rest assured I will pay you next fall, or winter,' such language is, in legal effect, an express promise to pay the debt in the fall or winter." 4. "A promise to pay a debt, from which the debtor has been relieved by bankruptcy, is not required to be in writing." 5. "If the jury believe, from the evidence, that the defendant made an express promise to pay the judgment, after he was discharged from bankruptcy, it makes no difference whether he made any payment on it or not—a payment on it was not necessary to revive the judgment; and

[Wolffe v. Eberlein.]

if the jury believe, from the evidence, that such express promise was made, they will find for the plaintiff."

The several rulings of the court on the pleadings and evidence, and the several charges given, are now assigned as error.

RICE & WILEY, and D. CLOPTON, for appellant.—(1.) The plaintiff did not sue on her original cause of action, but on the judgment which had been recovered on it; and the discharge in bankruptcy being pleaded, the plaintiff was allowed to reply a subsequent promise. This was a radical departure, and violative of the rules of pleading. The new promise was the cause of action, and the old debt was only the consideration on which that promise was founded.—*DePuy v. Swart*, 3 Wendell, 139; *Moore v. Viele*, 4 Wendell, 420; *Duffie v. Phillips*, 31 Ala. 571. When a debtor has been discharged in bankruptcy, his after-acquired property is discharged from liability for his prior debts.—13 U. S. Digest, N. S. 84. Here, the plaintiff, in order to obtain a judgment, claims that his old judgment is revived; and in order to obtain satisfaction of any judgment he may recover, he will be compelled to claim that the subsequent promise created a new debt. (2.) The grant of letters of administration to the plaintiff, as shown by his transcript, is void on its face. The Probate Court had no power to grant administration for a single specified purpose, or over a single litigated claim; or it had equal jurisdiction to grant such special administration for each separate demand or claim due the intestate's estate. (3.) All of the assignments of error are insisted on.

WATTS & SONS, *contra*.—(1.) The action was properly brought on the judgment, and the subsequent promise was a good reply to the plea of bankruptcy.—*Shippey v. Henderson*, 14 Johns. 178; *Dusenbury v. Hoyt*, 53 N. Y. 523; *Maxim v. Morse*, 8 Mass. 127; *Otis v. Gazlin*, 31 Maine, 567; *Moffitt v. Dearing*, 6 Ala. 776; *Evans v. Carey*, 29 Ala. 99; *Bradford v. Spyker*, 32 Ala. 140; Ang. Lim. § 288. (2.) The action was properly brought in the name of the plaintiff in the judgment, and was properly revived, notwithstanding the assignment, in the name of her administrator.—*Smith v. Harrison*, 33 Ala. 706; *Martin v. Johnson*, 54 Ala. 271. (3.) The plaintiff's letters of administration, whatever may be their legal effect, are not void. *Flora v. Mennice*, 12 Ala. 826; *Farrow v. Bragg*, 30 Ala. 261; Code §§ 2538, 2625; 1 Lomax on Ex'rs, 310, §§ 5, 6.

SOMERVILLE, J.—The proposition is not denied, that where a debt has been discharged by a decree in a court of bankruptcy, it may, in a certain sense, be revived, so as to

VOL. LXXIV.

[Wolffe v. Eberlein.]

renew its legal obligation, by an express and unequivocal promise to pay it, made by the debtor subsequent to the date of discharge. The authorities are in perfect harmony as to this principle, the only conflict of opinion being as to cases where the debtor makes a promise to pay prior to obtaining his certificate of discharge.—*Evans v. Carey*, 29 Ala. 99; *Bishop on Contr.* § 448; *Allen v. Ferguson*, 18 Ala. 1; *Knap v. Hoyt*, 57 Iowa, 591; s. c., 42 Amer. Rep. 59; *Nelson v. Stewart*, 54 Ala. 115. This case is clearly of the former class, the promise to pay being express, and subsequent to the discharge in bankruptcy.

The present action was brought on a *judgment*, in defense of which the appellant, in the court below, set up by way of plea his discharge in bankruptcy. The plaintiff made replication of an express promise by defendant to pay the claim unconditionally. The main point of contention is on the form of the pleadings. It is insisted that the replication of a verbal promise is a *departure* from the original cause of action, which declared on a judgment, and that the action should have been based upon the new promise, and not upon the judgment, which was extinguished by the fact of defendant's discharge in bankruptcy.

There are two views of this subject presented in the books, as to the effect of a new promise to pay in its relations to a plea of bankruptcy. The more logical and sounder view, perhaps, is, that the new promise, and not the old debt, is the meritorious cause, or real foundation of the action. The old debt has become extinguished by operation of law, and no longer exists. But the moral obligation to pay still exists, and this, coupled with the antecedent valuable consideration, is sufficient to support a new promise, if clear, distinct, and unequivocal in its nature. The moral obligation, uniting to the new promise, makes what was designated by Lord Mansfield, in *Truman v. Fenton*, Cowp. 544, "a new undertaking and agreement."—*DePuy v. Swart*, 3 Wend. 135; s. c., 20 Amer. Dec. 673; *Fraley v. Kelly*, 88 N. C. 227; s. c., 43 Amer. Rep. 743.

There is another class of cases, supported perhaps by the weight of authority, which refer the efficacy of such promises exclusively to the principle, that the defendant may renounce the benefit of a law designed for his protection, and that the effect of the new promise is to *waive any discharge* that may be obtained in bankruptcy, at least to an extent commensurate with the promise itself. Mr. Wharton, in his recent work on Contracts, after observing that the validity of promises of this class is no longer placed upon the consideration of moral obligation, asserts that "the liability is now based exclusively on

[Wolffe v. Eberlein.]

the right of a party to *waive the protection of a statute* relieving him from indebtedness.”—1 Whart. Contr. § 513. Mr. Addison suggests, that “the express promise operates to revive the liability and *take away the exemption*.”—1 Add. Contr. (Amer. Ed.) § 13. The same view is adopted by Mr. Parsons and Mr. Bishop in their works on Contracts, and, in fact, with singular unanimity by most if not quite all of the text-writers.—1 Parsons’ Contr. 434–435*; Bishop on Contr. §§ 446–448; Leake on Contr. 317; 1 Story on Contr. § 466. The past decisions of this court seem to have proceeded upon this theory of the law, and the prevailing system of pleading, by which the plaintiff is accustomed to declare upon the original promise, and to introduce the new promise by way of replication to the plea of bankruptcy, is manifestly an outgrowth of it.—*Dearing v. Moffitt*, 6 Ala. 776; *Branch Bank v. Boykin*, 9 Ala. 320; *Evans v. Carey*, 29 Ala. 99, 107.

It is not required that we should decide which of these two theories is correct. The better view, in our judgment, is that suggested by Mr. Parsons, that the plaintiff may, at his election, bring suit either upon the new promise, and declare upon it, in the first instance, as the foundation of his action, thus himself assuming the *onus* of proving the discharge in bankruptcy, without which the new promise would be unavailing; or he may sue upon the old or original promise, and, when the plea of bankruptcy is interposed as a defense, may set up the new promise in his replication to the plea, as in analogous cases involving the defense of infancy and the statute of limitations. 1 Parsons’ Contr. 434–5* (6th Ed.), NOTE (v), and cases cited.

In *DePuy v. Swart* (3 Wend. 135; s. c., 20 Amer. Dec. 673, 676), while it was held that the liability of the bankrupt was referable only to the new contract, it was said to be well settled, that the plaintiff could declare on the original cause of action. “The inconsistency of making the new promise the basis of the action,” it was observed by MARCY, J., “and at the same time allowing the plaintiff to declare upon the antecedent debt, which has been discharged, or the remedy upon it barred, has been often presented in the courts of England and of this country; and although it has been sanctioned, it has been looked upon as a deviation from the general rule requiring a plaintiff to state in his declaration the agreement or whole cause of action whereon his suit is brought.” In *Shippey v. Henderson*, 14 Johns. (N. Y.) 178, it was held proper for the plaintiff to sue the bankrupt on the original demand, and to reply the new promise in avoidance of the discharge set up in the plea; and such replication was decided not to be a departure from the declaration. This ruling was followed in many subsequent cases in New York, including *Dusenbury v. Hoyt* (53

[Wolffe v. Eberlein.]

N. Y. 521), decided as late as 1873, in which the court said: "We are of opinion that this rule of pleading, so well settled, and so long established, should be adhered to. The *original debt* may still be considered the cause of action *for the purpose of the remedy*."—*Fitzgerald v. Alexander*, 19 Wend. 402; *Wait v. Morris*, 3 Ib. 394. In the case of *Field's Estate* (2 Rawle Penn. 351; s. c., 21 Amer. Dec. 454), it was held that the new promise was substantially the meritorious cause of action; but it was said that it *might be treated otherwise in the pleadings*, by declaring on the old promise, although this was admitted by GIBSON, C. J., who rendered the opinion in the case, to be *an anomaly* in pleading. There are a large number of cases supporting the same view.—See Bishop on Contr., § 448, and cases cited in NOTE 3.

We have been cited to no case which holds that this long-established rule of pleading is to be abandoned, where the action is one of debt brought upon a *judgment* of a court of record. The case of *Maxim v. Morse*, 8 Mass. 127, was brought on a judgment, and the plaintiff's replication of a verbal promise by the bankrupt to pay the debt was held to be no departure from the original cause of action, being declared to be such more in appearance than reality. The case of *Otis v. Gazlin*, 31 Me. 566, was a similar suit, in which the plaintiff successfully declared upon the judgment, instead of the new promise, and, although bankruptcy was pleaded, the form of pleading was held to be correct.

A strong analogy is found in cases involving the plea of the statute of limitations. Bankruptcy, it is true, extinguishes the debt as a legal subsisting demand, while the operation of the statute is only to destroy the remedy. Yet it is settled in the one class of cases, as well as in the other, that the new promise is the true and real foundation of the cause of action, and, strictly speaking, upon it alone can a recovery be had. Such is the settled doctrine of this court, and since the case of *Bell v. Morrison*, 1 Peters, 351, decided by Judge STORY more than fifty years ago, it may be regarded as the recognized doctrine in this country.—*Bradford v. Spyker*, 32 Ala. 134; Angell on Lim. (6th Ed.) § 212. Notwithstanding this fact, the rules of pleading permit the plaintiff to declare upon the original debt, and, when the statute of limitations is pleaded, to reply the new promise.—Angell on Lim. § 288. In *Bradford v. Spyker*, 32 Ala. 148, this feature of pleading was said to be an anomaly in the law; but the court approved it, as sanctioned by long practice rather than in principle, quoting the language of BEST, C. J. in *Upton v. Else*, 12 Moore, 303 (22 Eng. Com. Law, 451), where he said: "Probably, the new promise ought in strictness to be declared on specially;

[Wolffe v. Eberlein.]

but the *practice is inveterate the other way*, and we cannot get over it."

The practice adopted in the present action of declaring on the original debt, where the bankruptcy of the defendant is pleaded, has prevailed for a long time in this State. Though an anomaly in the law, we can see no good to result from abolishing it by judicial decision, but rather inconvenience and confusion. Admitting it to be wrong in principle, we feel justified in permitting it to stand, if for no other reason, because it is supported, with few exceptions, by the antiquity of uninterrupted practice, not only in this State, but generally in the courts of England and America.

2. The objection to the party plaintiff, in whose name the present suit was instituted or revived, is not well taken. A judgment is not "*a contract*, express or implied, for the payment of money," within the meaning of section 2890 of the present Code, such as entitles the assignee to bring an action thereon in his own name.—*Johnson v. Martin*, 54 Ala. 271. The assignment, moreover, was made to the plaintiff, Eberlein, individually, after the commencement of the action, having been made by Mrs. Eslava, the original plaintiff in the judgment, during her life-time. The legal title remained in the latter, with only an equity vested in the assignee. After the death of Mrs. Eslava, this title passed to her administrator in trust for the beneficiary, and the suit was properly revived in his name.

3. In *Evans v. Carey*, 29 Ala. 99, it was decided that an express promise by a bankrupt, to pay a particular debt to a creditor, would "avoid the effect of such discharge, as well when the words constituting such promise are spoken to a third person, as when they are spoken to the creditor personally, or to his agent." On this principle, the promise made to the agent of the assignor of the present judgment must be held to enure to the benefit of the assignee. We follow this authority, although it can probably be justified solely on the theory, that the effect of the new promise is only, using the language of Mr. Parsons, "to do away the obstruction otherwise interposed by the bankruptcy and discharge."—1 Parsons Contr. 434; *Otis v. Gazlin*, 31 Me. 567. It harmonizes with the practice, however, of declaring upon the original debt in such cases, and of introducing the new promise by way of replication to the plea of bankruptcy.

4. It is contended that no recovery can be had in the present action, because the plaintiff was never legally appointed administrator of Mrs. Eslava's estate, an issue which was properly presented under the plea of *ne unques administrator*. The order of the Probate Court of Mobile, showing the

[Wolffe v. Eberlein.]

appointment, recites that "George Eberlein is hereby appointed the legal administrator of the said estate [of Celestine Eslava], *for the special purpose of conducting a suit at law* instituted by said Celestine Eslava in the City Court of Montgomery, in the State of Alabama, against one Frederick Wolffe," proceeding further to describe the present action. It is insisted that these letters of administration are absolutely void. The authority of the Probate Court to appoint the plaintiff administrator is not denied. It is not shown that there is no vacancy in the administration, and, in the absence of evidence to the contrary, such vacancy must be presumed, in view of the fact that Courts of Probate in this State are courts of "*general jurisdiction* for the granting of letters testamentary and of administration."—Const. 1875, Art. VII. § 9; *Burke v. Mutch*, 66 Ala. 568; *Allen v. Kellam*, 69 Ala. 442; *Gray's Adm'rs v. Cruise*, 36 Ala. 559. Conceding that Courts of Probate have no power to limit the duties of the administrator to the narrow sphere of conducting a single suit, we are unable to perceive upon what principle this would vitiate the appointment itself. The power to appoint is unquestionable, and so likewise is the judicial act of appointment in exercise of the power. The objection, if valid, goes only to the effort to put a limitation upon the authority of the administrator, which would present the case only of the exercise of a lawful power in an unlawful or irregular manner. This would, *at most*, render the judgment *voidable* and not void, and such irregularity could be presented only in a direct proceeding, and not on collateral assaillment.—*Burke v. Mutch*, 66 Ala. 568, and cases there cited. Perhaps the sounder view would be, that the attempt to limit would be a mere nullity, in as much as the law fixes the duties of the administrator after appointment, and not the probate judge in violation of the law. The present case does not seem to be affected by sections 2358 and 2625 of the Code, relating to special administrators and administrators *ad litem*.

There are some other exceptions in the record, based upon the rulings of the court on the evidence. These we have examined, and find nothing of merit in them.

The judgment of the court below is, in our opinion, free from error, and it is accordingly affirmed.

[Pettus v. McKinney.]

Pettus v. McKinney.

Bill in Equity by Widow, for Allotment of Dower, with Account of Rents and Profits; Cross-Bill to revive and enforce Decree for Purchase-Money as Lien on Land.

1. *Loan of money to pay purchase-money of land; rights of lender, as against purchaser's widow.*—A person who lends or advances money to pay the purchase-money for lands, or to pay a decree which the vendor has obtained subjecting the land to sale in satisfaction of his lien, and who takes a mortgage or deed of trust on the lands to secure the repayment of the money, can not claim to be subrogated to the vendor's lien on the land, nor to have the decree revived and enforced in his favor; and the wife of the purchaser not joining with her husband in the execution of the mortgage or deed of trust, her right to dower in the lands is superior to the rights and equities of the lender.

2. *Merger of parol stipulations in writing.*—When a contract is reduced to writing, executed by one party and accepted by the other, the writing becomes, in the absence of fraud or mistake, the sole memorial and expositor of the terms of the contract, and all prior verbal stipulations are merged in it.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. THOMAS COBBS.

This appeal was sued out from a decree of the chancellor sustaining a demurrer to a cross-bill, which was filed by Joseph A. Pettus, individually and as administrator of the estate of H. J. Cartwright, deceased, together with M. T. Cartwright, against Mrs. Sarah A. McKinney, the widow of James H. McKinney, deceased, together with the children and heirs of said McKinney, and the heirs at law of William E. Eddins, deceased. The original bill in the cause is not set out in the transcript, and the only averment of the cross-bill, as to its allegations, purpose and prayer, is in these words: "In said original cause, said Sarah A. McKinney therein seeks to have dower and homestead, and the incidental rents and profits, allowed her in certain lands, hereinafter described; and said Pettus and M. T. Cartwright deny and dispute her claims on various grounds." "The facts and circumstances connected with said land and claim," as the cross-bill further alleged, so far as material to an understanding of the points decided by this court, are these: In February, 1861, James H. McKinney bought of W. E. Eddins two tracts of land, known respectively as the "Burt place" and the "Stewart place," paying part of the purchase-money in cash, and executing his two promissory

[Pettus v. McKinney.]

notes for the residue, payable respectively two and three years after date, with interest; receiving from said Eddins his bond, conditioned to make title "by the last day of the present year, 1861," and entering into possession under the contract. These notes, not being paid at maturity, were afterwards transferred by said Eddins to Richard B. Eagin, who, in July, 1867, filed a bill in equity against said McKinney, in the Chancery Court of Limestone, to subject the lands to their payment; and he obtained a decree, ordering a sale of the lands by the register, unless the amount due on the notes was paid on or before the 1st November, 1868. The money not being paid by the day specified, the register advertised the lands for sale, under the decree, on the 7th December, 1868; and on that day, before the sale, as the cross-bill alleged, "said James H. McKinney went to Andrew C. Legg, and begged and besought him to advance the amount of said decree, and thereby prevent the sale of said lands, and promised to give him, and that he should have, a valid lien, mortgage, or deed of trust on said lands, if he would thus aid him, said McKinney. Thereupon, said Legg advanced the amount of said decree, and the costs of said suit, to the said McKinney, though his solicitor; and at the same time, and in accordance with said promises of said McKinney previously made, took from said McKinney a deed of trust on said lands to secure the same. In consequence of said promises, said advance, and said deed of trust, the register stopped his proceedings to sell said land; and said decree stands to this day, unsatisfied, unreceipted, and unreversed."

The deed of trust, a copy of which was made an exhibit to the cross-bill, recites that "the party of the second part [A. E. Legg] has this day advanced to the party of the first part [Jas. H. McKinney] the sum of \$610.07 to secure his land from sale, it being agreed, as part of the consideration, and as an inducement for the said party of the second part to advance said sum above specified, that the said party of the first part would convey the property hereinafter mentioned to H. J. Cartwright, as trustee, to secure the same;" conveys the lands, including both places, to said Cartwright as trustee, with power of sale if default should be made in the repayment of the money "on or before twelve months after the making of this deed;" is signed by said McKinney, Legg, and Cartwright, attested by two witnesses, and filed for record in the Probate Court on the 28th December, 1868. In February, 1870, as the cross-bill further alleged, "said Legg, for value, assigned and transferred said deed of trust, with all his rights thereunder, to said H. J. Cartwright," the trustee therein named. Cartwright died, intestate, in May, 1871, and letters of administration on his estate were duly granted to said J. A. Pettus, who

[Pettus v. McKinney.]

was still acting as administrator when the cross-bill was filed. In January, 1873, said administrator sold the lands, under the power contained in the deed of trust; M. T. Cartwright, who joined with him as complainant in the cross-bill, becoming the purchaser, at the price of \$500, and receiving a conveyance from the administrator. "Said Jas. H. McKinney at once voluntarily surrendered the possession of said land to said M. T. Cartwright, rented from him the portion of said land known as the 'Burt place,' and moved out from the portion of said land known as the 'Stewart place,' a day or two before he died, February 18th, 1873." After the death of said McKinney, his two grown sons "fulfilled his contract of lease of the said 'Burt place,' which was for the balance of the year 1873; while Mrs. Sarah A. McKinney, his widow, immediately after his death, "took what personal property of his estate she wanted, expressed herself satisfied with her share of his estate thus taken, and voluntarily left and abandoned said land, with no purpose ever to return thereto; she established her home elsewhere, and did not in any manner intimate or indicate that she claimed dower or homestead in said lands, until more than one year afterwards," when she filed her petition in the Probate Court, asking an allotment of homestead in the land. Her right of homestead was contested by said Pettus as administrator, who brought the case to this court by appeal, but his appeal was dismissed.—*Pettus v. McKinney*, 56 Ala. 41.

On the 12th February, 1873, a few days before his death, said James H. McKinney, "for value, sold and conveyed his equity or right of redemption in said lands to his adult son, James D. McKinney, who, on 21st February, 1873, for value, sold the same to said Pettus; and soon after said Pettus thus acquired said equity or right of redemption, he paid said M. T. Cartwright the \$500 he paid for said land, with ten per cent. thereon, and took from him a deed to said land, which is made an exhibit to this bill. Said Sarah A. McKinney knew of both of said transactions as to said equity or right of redemption, was present at the first one, and made no objection to either. There were two separate and distinct sets of houses and dwelling-places on said land, each adapted to and used as a homestead, one on the 'Burt place,' and one on the 'Stewart place.' When said deed of trust was executed, said James H. McKinney lived with his family at and on the 'Stewart place;' but afterwards, and shortly before his death, left and abandoned said place with his family, and the eighty acres of land on which he then resided, and moved on to the 'Burt place,' where he thenceforth lived as the tenant of said Cartwright."

On these allegations, the cross-bill prayed, "that said debt mentioned in said deed of trust be held and declared a pur-

[Pettus v. McKinney.]

chase-money debt for said land, precluding dower and homestead therein as to said Sarah A. McKinney; that said previous promise and agreement of said James H. McKinney, that said Legg should have a good and valid claim and lien on said land, in consideration of the advance of said money to said Fagin, be effectuated and enforced in favor of said Pettus; that the lien for the purchase-money of said land, and the said decree therefor in favor of said Eddins and said Eagin be revived in favor of said Pettus, and declared superior to the claim of dower and homestead by said Sarah A. McKinney; that said proceedings in said Probate Court, for the allotment of homestead to said Sarah A., be enjoined; and said Sarah A. be declared estopped from claiming homestead in said land; that all clouds on the title of said Pettus to said land be removed, and whatever title to said land there may be in any of the defendants be divested out of them by the decree of the court, and declared vested in said Pettus."

Mrs. McKinney filed a demurrer to this cross-bill, assigning ten special grounds of demurrer, and also moved to dismiss it for want of equity. The chancellor sustained the demurrer and the motion, and dismissed the cross-bill; and his decree is now assigned as error.

McClellan & McClellan, for appellants.—1. Under the facts stated, an equitable lien on the land was created in favor of A. C. Legg, which a court of equity will enforce in his favor, or in favor of his assignees, against the husband, and against his privies in blood or estate.—Jones on Chat. Mortgages, § 10; 74 N. Y. 348; 35 Ala. 131; 24 Ala. 37; 1 Speer's (S. C.) Eq. 413; 2 Dess. Eq. 582. This principle will be applied to this agreement, even if the deed of trust should be held void. 1 Jones Mort. 168, 169. The husband had the right to make this agreement, regardless of the wife, because the lien for the purchase-money was superior to any right she could have.—40 Ala. 538; Thompson on Homestead, 331, 334, 342-4, 365; 1 Brick. Dig. 613, § 22.

2. The wife's signature to the deed was not essential to its validity. When the purchase-money is advanced by a third person, to whom the vendee simultaneously gives a mortgage or deed of trust on the land, the right of such mortgagee, or of those holding under him, is superior to any claim of dower on the part of the vendee's widow.—*Boynton v. Sawyer*, 35 Ala. 497; *Gillespie v. Somerville*, 3 Stew. & P. 447; *Brooks v. Woods*, 40 Ala. 538; *Eslava v. Lepretre*, 21 Ala. 504; 14 Ala. 371; 62 Ala. 526; *Crabb v. Pratt*, 15 Ala. 843; *Edmondson v. Welsh*, 27 Ala. 578; 1 Jones Mort. 464, 466, 527-30; 2 *Id.* 927, 944-5; 4 Wait's Ac. & Def. 563-4; 6 Cowen, 316; 1 Bar-

[Pettus v. McKinney.]

bour, 399; 1 Paige, 192; 14 Maine, 299; 14 Peters, 21; 7 Halst. 22; 2 McCord, 54; 4 Mass. 566; 15 Johns. 458; 1 Cowen, 560; 14 Mass. 351; 27 Maine, 11; 4 Leigh, 30; 10 N. H. 500; 1 Bay, 312; 13 Me. 489; 45 Me. 493; 1 Bish. M. W. 326-7; Co. Litt. 31; Thompson on Homestead, 331-61; Central Law Journal, April, 1881, p. 330; same, October 14, 1881, p. 298; same, November 11th, 1881, p. 379. The law as to homestead rights is the same.—Thomp. on Homestead, 333-43, 361-2; 1 Jones Mort. 464-6; 45 Geo. 483; 5 Nev. 233; 37 Ill. 438; 20 Ill. 53; 2 Allen, Mass. 390; 14 Mass. 351; 51 N. H. 448; 51 Ill. 500; 8 Cal. 271; 10 Cal. 380; 16 Cal. 156, 181; 7 Iowa, 60; 20 N. Y. 412; 29 Ark. 591; 44 Barb. 232; 1 Sandf. N. Y. 76.

3. What is said in *Pettus v. McKinney*, 56 Ala. 41, against this unbroken array of authorities, is mere *dictum*, the appeal having been dismissed for want of jurisdiction. That proceeding, too, was at law, where form is regarded; while this is in equity, where the substance only is looked to. In *Chapman v. Abrams*, 61 Ala. 108, the deed to the vendee was executed three months before the mortgage was made to the person who paid the purchase-money.

4. When the husband died, the act of February 8th, 1872, was in force; and that act was repealed by the act of April 23d, 1873, which contained no saving clause; thus leaving the right of homestead dependent on the constitution of 1868, which gives a homestead only against debts contracted since its adoption. Legg's debt being only an extension or renewal of the original debt, which was contracted in 1861, no homestead right can be asserted against it.—Thompson on Homestead, 359-60, 311-16; 37 Ill. 438; 51 N. H. 448; 42 N. H. 43; 4 Bush, Ky. 379; 22 Gratt. 266; 10 Allen, Mass. 146; 17 Ib. 145; 15 Wall. 610; 67 N. C. 393.

5. If the deed of trust is defective, or inoperative, the original lien or incumbrance, which was discharged by the money advanced by Legg, will be revived in his favor, and he or his assignees will be subrogated to the rights of the original vendor.—1 Jones Mort. 208, 874-85, 966-71, 529-30, 205-07; 2 Ib. 966; 62 Ala. 526; 57 Ala. 432; Sheldon on Subr. 8, 19, 20, 38.

6. When the deed of trust was executed, the husband resided on the "Stewart place," and occupied it as his residence; and if the deed be invalid as an alienation of that place, for want of the wife's signature, it is certainly valid as to the other lands.—55 Ala. 344. But he afterwards abandoned and surrendered the possession of that place, and was residing on the "Burt place" at the time of his death; and if any right of homestead attached to that place, it was subsequent and inferior

[Pettus v. McKinney.]

to the deed of trust. His widow, then, can not claim a homestead in either place: not in the "Stewart place," because it was not her husband's residence at the time of his death; nor in the "Burt place," because it had been conveyed by the deed of trust before any right of homestead attached.—55 Ala. 367; 53 Ala. 135, 147.

JAS. BENAGH, *contra*.—The decree in favor of Eagin was extinguished by the payment of the debt, principal, interest, and costs, as alleged in the cross-bill; and the vendor's lien was thereby discharged.—2 Brick. Dig. 323, § 12; *Ib.* 324, § 15; *Ib.* 325, § 33. All previous "promises and agreements" between Legg and McKinney were merged in the deed of trust, when it was accepted; and the rights of the parties must be determined by the deed.—Smith, Contr. 20, 28; Sto. Contr. § 671; Chit. Contr. 199; 1 Greenl. Ev. § 275; 1 Brick. Dig. 396, § 297. As against the widow's rights of dower and homestead, the deed of trust is inoperative and void.—*Pettus v. McKinney*, 56 Ala. 41; *Chapman v. Abrahams*, 61 Ala. 108; 1 Scribner on Dower, 264, § 47. The deed of trust, if taken by Eddins, would have been a waiver of the vendor's lien on the land; and being taken by Legg, claiming as an assignee of the debt to Eddins, it must have the same effect.—*Mackreath v. Symonds*, 40 Law Library, 243; Bispham's Equity, § 355, and cases cited; *Foster v. Trustees*, 3 Ala. 302; *Walker v. Struve*, 70 Ala. 167; *Donegan v. Hentz*, 70 Ala. 437; *Coster v. Bank*, 24 Ala. 37.

BRICKELL, C. J.—The particular question of importance, and decisive of the rights of the parties, presented by this record—whether the lender of money to discharge lands, the homestead of the borrower, from the lien of the vendor for the payment of the purchase-money, acquires a right to be repaid, which is superior to, and will prevail over the right of the widow of the borrower to the homestead—was decided adversely to the appellants, when a cause between these parties was before this court at a former term, on appeal from a decree of the Court of Probate assigning homestead to the widow. *Pettus v. McKinney*, 56 Ala. 41. Subsequently, in *Chapman v. Abrahams*, 61 Ala. 108, the court decided, that an advance of money to a purchaser, to relieve lands from the incumbrance of the lien of the vendor, or the payment of money for that purpose, at the request of the purchaser, to whom the vendor, on the payment, conveyed the lands, did not create a resulting trust in favor of the lender, nor was he entitled to be subrogated to the lien of the vendor, which was by the payment extinguished. The advance, or payment, was made upon a verbal promise that it should be secured by a mortgage on the

[Pettus v. McKinney.]

lands; which was subsequently executed, but was invalid, because the purchaser was a married woman, to whom the lands on the payment were conveyed, thereby becoming her statutory separate estate, the alienation of which by mortgage was unauthorized. My own opinion was, that, under the facts of that case, the parties did not intend a payment of the debt for the purchase-money, nor an extinguishment of the lien upon the lands, but merely the substitution of one creditor for another,—a change in the form and evidencé of the debt, but not of its character, and the preservation by mortgage of the lien to which the lands were subject; that the loan of the money, its application, the conveyance to the wife, and the mortgage, were but parts of one transaction, to which should be applied the general doctrine of a court of equity, that a deed conveying lands unconditionally, and a mortgage made by the grantee to secure the payment of the purchase-money, contemporaneously executed, are read as if they were but one instrument, and practically the legal effect is, that an estate on condition is created,—an estate which can become absolute only on the payment of the purchase-money. That view did not receive the acceptance of a majority of the court, and the principle already stated was announced.

Without departure from these decisions, which are rules of property, and can not without the introduction of insecurity to the titles to lands be disturbed, it is manifest the right of the widow must prevail. In the execution of the deed of trust to the lender of the money, made on the day of the loan, she did not join. The constitution declares void an alienation of the homestead by the husband, in the execution of which the wife does not join. The parol agreement of the husband, that the lender should have a security upon the lands for the re-payment of the money borrowed, was satisfied by the execution of the deed of trust, and as a satisfaction the lender accepted it. There was no fraud, no mistake of fact; in it all previous parol stipulations were merged. When parties make agreements verbally, and then reduce them to writing, in the absence of fraud or mistake, the writing becomes the sole memorial and expositor of the contract, and in it all prior parol or verbal stipulations are merged.—1 Brick. Dig. 865, § 866.

The debt for the purchase-money having been extinguished, the husband by the payment was clothed with a perfect equity in and to the lands. There remained outstanding in the original vendor no more than the naked legal estate, which was held in trust for the husband, and a conveyance of which he had an unqualified right to demand and compel. The statute entitles a widow to dower in all lands, of which the husband, at the

[Conner & Wife v. Smith.]

time of his death, has a perfect equity, having paid all the purchase-money thereof.—Code of 1876, § 2232.

We find no error in the decree of the chancellor, and it must be affirmed.

Conner and Wife v. Smith.

Bill in Equity by Purchasers from Mortgagor, for Account and Redemption, against Purchaser at Mortgage Sale.

1. *Averments of bill for account and redemption.*—Where the children of the mortgagor, claiming as subsequent purchasers from him, file a bill against the mortgagee and purchasers at a sale under the mortgage, alleging fraud and oppression practiced by the mortgagee in the matter of the accounts, and asking an account and redemption, “they must allege the true state of the account between the mortgagor and mortgagee—that is, must allege the amount claimed by the mortgagee, and the amount admitted by the mortgagor, or show the several items contested between them.” General averments that the balance due, if any, was inconsiderable, and that the purchasers bought with knowledge of the true state of the account, are not sufficiently certain and definite.

2. *Variance between allegations and proof.*—Where the bill is filed by subsequent purchasers, against the mortgagee and alleged sub-purchasers claiming under him, asking an account and redemption; while the proof shows that a part of the property, though conveyed by the mortgage, was never sold under it, and that the defendant claiming that part holds under a purchase at a sale by the register foreclosing a former lien,—the variance is fatal, unless cured by amendment.

3. *Multifariousness.*—A bill which seeks an account of the mortgage debt, and a redemption of the several lots and parcels of land conveyed by it; and which shows on its face that the several sub-purchasers claim separate and distinct lots, and that one of the lots was not sold under the mortgage, but was bought by the defendant claiming it at a sale under a decree foreclosing an older lien,—is multifarious.

4. *Dismissal on demurrer, in vacation.*—When a bill is dismissed on demurrer in vacation, on account of defects which are amendable, the complainant should be allowed an opportunity to amend it; and the failure to allow him an opportunity to amend will work a reversal of the decree on error.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 17th February, 1877, by Thomas U. Conner and his wife, who was a daughter of William H. Moore, jointly with the other children of said Moore, against Elon G. Smith, Robert H. Herstein, Maurice Bernstein, and others; and sought to redeem certain real property, consisting of a block of stores in Huntsville and other parcels of land, which had been conveyed by said Moore to his

[Conner & Wife v. Smith.]

children, by deed dated September 11th, 1866, in payment of an admitted indebtedness "to a large amount," as stated in the deed. This deed, in describing and conveying the property, stated that it was "subject to debts due to Joseph C. Bradley and E. G. Smith." The debt due to said E. G. Smith was secured by a deed of trust on the property, which was dated May 10th, 1866, and by which the property was conveyed to F. P. Ward, as trustee, with power of sale if the debt was not paid on or before March 16th, 1867. The property was sold by the trustee under this deed, Smith himself becoming the purchaser; and he afterwards sold and conveyed the lots, by separate conveyances, to the several defendants. A portion of the property was also sold by the register in chancery, under a decree foreclosing the lien of the debt in favor of Bradley; and one of the defendants was in possession of that lot, claiming under a purchase at the register's sale. As the case is here presented, it is unnecessary to state in detail the facts connected with these several matters. The bill prayed an account of the mortgage debt to Smith, charging fraud and oppression on his part, and knowledge by the sub-purchasers from him of the true state of the account; and sought to redeem on payment of the balance due, if any.

The case was before this court at its special November term, 1880, on appeal from the chancellor's decree overruling a demurrer to the original bill; when the chancellor's decree was reversed, and the cause remanded.—*Smith v. Conner and Wife*, 65 Ala. 371-77. After the remandment of the cause, the bill was amended; and the present appeal is sued out from the chancellor's decree sustaining the demurrers to the bill, original and amended, and dismissing it for want of equity. The material facts, as the case is now presented, are stated in the opinion of the court.

D. P. LEWIS, for appellants.—So far as Smith is concerned, the bill certainly contains equity. If the infants are prejudiced by any defects in the bill, the court will order it to be amended.—Story's Eq. Pl. § 892. The dismissal of the bill in vacation, without allowing the appellants an opportunity to amend, must work a reversal.—*Little v. Snedecor*, 52 Ala. 167; *Bishop v. Ward*, 59 Ala. 253; *Kingsbury v. Milner*, 69 Ala. 502.

CABANISS & WARD, and L. P. WALKER, *contra*, contended that the bill was multifarious, and was obnoxious to the other grounds of demurrer specifically assigned.

STONE, J.—This case has been heretofore in this court—65 VOL. LXXIV.

[Conner & Wife v. Smith.]

Ala. 371. We then declared, that the demurrers of the defendants to the original bill should be sustained, unless it was amended so as to give it equity. We did not point out the assigned grounds of demurrer which should be sustained, but we specified three particulars in which the bill was defective. The cause being remanded to the court below, an amended bill was filed, in which the defects in the original bill which we had pointed out were attempted to be remedied. There was a demurrer to the amended bill, which the chancellor sustained, and dismissed the bill.

Among the grounds specified in the demurrer to the original bill, was the charge that it was multifarious. The chancellor, on the last hearing, reached the conclusion that we had pronounced the bill defective on this account. We did not expressly rule on this question, although it was probably our duty to do so. It is not embraced in the three propositions, which we asserted were fatal to the bill as then presented. We will recur to this subject further on.

In our former opinion, speaking of the original bill, we said : "There is no averment of the bill, showing the true state of account between Moore and Smith, or tending to show that Herstein and Bernstein had any knowledge or notice thereof, or that they, to any extent, participated in, or were cognizant of any fraud or oppression practiced by Smith, if any were practiced. The averments of the bill on this subject are very vague." The attempt to heal this defect in the amended bill is in the following language: "That at the time of said sale, the said purchasers [Herstein and Bernstein] had full knowledge and information, by notice from complainants, what were their rights with respect to said corner lot, and in respect to the adjoining lot, which was subsequently bought by them from said Elon G. Smith; that they had full notice of the transfer of William H. Moore to complainants, of the property in question; that the same was on valuable consideration; that the account of Elon G. Smith against William H. Moore was unjust, and destitute of all equity and fairness; that the same was nearly, if not quite discharged, and that said Smith was using the large account, without recognizing and allowing the just credits to which the same was entitled, inequitably and oppressively, and thereby placing it out of the power of the said William H. Moore, or complainants, to pay any small balance, if any were due, and depress the value of the said lots so sold. And complainants aver that said Herstein and Bernstein became the purchasers of said lot from the register, and the lot from Elon G. Smith, with a full knowledge of the facts above set forth, and at less than two-thirds of the value of said property; that they purchased what they knew to be a great

[Conner & Wife v. Smith.]

bargain, with full knowledge of the facts that made their title imperfect. And complainants aver that they believe that, at the time the said Elon G. Smith purchased the said lot in the Moore block (which he did for the sum of \$3,000), the said William H. Moore owed him, if any thing, an inconsiderable sum, the precise amount of which, if any thing, complainants can not tell, and a reference will be necessary to determine the same; . . . that Smith claimed a large amount of debt that was not due, and entirely fictitious; that this claim, under a sale by virtue of a power in the deed of trust, operated to oppress and overwhelm said Moore and complainants. Complainants aver that the truth is, as they believe on information, that said William H. Moore was not really indebted to said Smith in any sum, upon a proper statement of the accounts, at the date of sale under said mortgage, and that said Bernstein and Herstein purchased with all the means of knowing the true state of said account."

It can scarcely be affirmed that this meets the requirements of our former ruling. It does not show the state of accounts between Moore and Smith. It fails to show the sum claimed by Smith as due to him, fails to show the sum conceded by Moore to be due, and thus fails to show the difference, if any, which existed between them. There is a generality and indefiniteness of averment, pervading alike the original and amended bills, which fall short of the rules required in pleading. Bills, in their statements of fact, should be so clear and specific, as that defendants may be informed what is claimed, what they are required to answer, and that the court may know what decree to render, in case of demurrer, or decree *pro confesso*. *McDonald v. Mobile Life Insurance Co.*, 56 Ala. 468. The complainants in this case are the children of William H. Moore, who had the contested dealings with Smith. It would be harsh to suppose, in the absence of averment, that he, the father, was unwilling to furnish them information of the nature and extent of claims set up by Smith, and of the items disputed, and credits claimed by him, Moore. A statement of the account, thus made out, would have presented the real issue in an important phase of this cause, and would have narrowed the area of proof to the items thus controverted. It is almost useless to add, this would have greatly simplified the controversy,—the real purpose of pleading. As the pleadings now stand, we are wholly uninformed of the sum claimed by Smith to be due him, and, with the exception of one item, of the various charges which made up the account. We are equally uninformed of the items relied on by Moore, as making up the recoupments and cross demands claimed by him, of the collective or separate sums of them, and, with the exception

[Conner & Wife v. Smith.]

of the item referred to above, of the charges in Smith's account objected to by complainants. In a proceeding, such as this is, in one of its aspects, to overhaul and settle an account, which must have consisted of many items of debit and credit, both the original and amended bills are too general and indefinite in their averments.—*Danner v. Brewer*, 69 Ala. 191.

The case having gone off in the court below on the demurrers interposed by defendants to the bill as amended, we can only look to the bill and amendment, in considering the assignments of error. According, then, to the averments of the bill, William H. Moore, father of complainants, on the 10th day of May, 1866, executed a mortgage, or trust-deed, to F. P. Ward, trustee, conveying to him lots in and near the city of Huntsville, to indemnify and secure Elon G. Smith, for advances made and to be made by him to Moore, of considerable amount. The deed of trust contained a power of sale on default. The lots thus conveyed were a plat of ground, fronting 44 feet on the public square, and extending back northeast on Washington street 78 feet, on which had been erected a building containing two stores, known as the "Moore Block;" and two other lots farther east, therein described, and fronting on the Meridianville turnpike. In September, 1866, Moore, by deed of bargain and sale, and on a recited consideration of "a large sum of money," amounting to more than fourteen thousand dollars, due from him to his children, granted, bargained and sold to them, among other property, the said lots he had so conveyed to Ward in trust, mentioned above. In this deed it is recited and stipulated, that said conveyed property was "subject to the debts of said Bradley and said Smith." The bill then avers that said Ward, as trustee, on the 24th day of June, 1867, and under the power contained in said deed of trust, did "sell the said lots in the city of Huntsville, at public sale, and that said Elon G. Smith became the purchaser of the same," and received a deed therefor.

The bill then avers that one Spraggins, who had become the assignee and owner of the Bradley claim and lien, filed a bill in the Chancery Court to enforce his lien; that he recovered a decree in said cause on the 8th day of June, 1867, condemning the corner lot of said Moore Block to sale; and that the register of the court, at a time not stated, sold the said corner lot, under said decree, to Herstein and Bernstein, and made them a deed. The corner lot is the northeastern half of the block, and lies contiguous to Washington street. The amended bill avers, that the suit in favor of Spraggins was commenced in March, 1867. The complainants in this bill were not made parties to the Spraggins suit. The bill further avers that, in November, 1867, Elon G. Smith "sold and conveyed the first

[Conner & Wife v. Smith.]

named lots, known as the 'Moore Block,' to Herstein and Bernstein, for the sum of six thousand dollars." The bill further charges that, on the 16th day of December, 1872, the said Smith sold and conveyed the said lots fronting on the Meridianville turnpike to Newman and Crowder, for the sum of five hundred dollars.

It will be seen by what is stated above, taken from the original bill, and not varied in the amendment, that the case made by complainants is as follows: *First*, that Wm. H. Moore conveyed the entire property, consisting of the Moore block (two stores) and the two lots fronting on the Meridianville turnpike, to Ward, trustee, for the purpose of indemnifying and securing Smith for advances made, and to be made. *Second*, that said Wm. H. Moore afterwards conveyed the equity of redemption in said property, and the title to other property, to his children, the complainants in this suit, reciting in the conveyance that the property conveyed was subject to the debts of Bradley and Smith. *Third*, that Ward, the trustee, sold the said property conveyed to him in the trust-deed, and said Smith became the purchaser at said sale, and received a conveyance. *Fourth*, that Spraggins, administrator of the transferree of the Bradley claim, filed a bill, and obtained a decree, condemning to sale the northeast, or corner half of the Moore block; under which decree, that half the block was sold, and conveyed by the register to Herstein and Bernstein. To this suit of Spraggins the children of Moore, complainants in this suit, were not made parties. *Fifth*, that Smith sold and conveyed the Moore block to Herstein and Bernstein. The averment of the bill, properly construed, is, that Smith had purchased, at Ward's sale, the entire Moore block, and that he sold the entire Moore block to Herstein and Bernstein. *Sixth*, that Smith had sold and conveyed the two lots fronting on the Meridianville turnpike, to Newman and Crowder.

The purpose of the present bill is to redeem all the lots. *First*, the corner, or north-east half of the Moore block, on the ground that the owners of the equity of redemption—the complainants in this suit—were not made parties to the Spraggins suit. On account of this omission, it is contended, that as to these complainants, the mortgage or lien has not been foreclosed, but still remains only a lien security. The investigation of this phase of the complaint, it would seem, would require that the Bradley or Spraggins claim should be overhauled. *Second*, the right to redeem the south-west half of the Moore block, which seeks a reinvestigation of Wm. H. Moore's indebtedness to Smith. It would seem that, in this phase of the controversy, Smith and Herstein and Bernstein are alone interested adversely to the complainants. *Third*, the right to

[Conner & Wife v. Smith.]

redeem the two lots fronting on the Meridianville turnpike. In this part of the litigation, only Smith and Crowder and Newman are interested adversely to the suit, according to the averments of the bill. There is demurrer to the bill for multifariousness.

If the averments of the bill be true, all the property in controversy passed, in the first instance, to Smith, under the sale and conveyance made by Ward, the trustee. The division took place under the sub-sales by Smith, of a part to Herstein and Bernstein, and of a part to Crowder and Newman. True, it is alleged that Herstein and Bernstein obtained another title to the north-east half of the Moore block, by their purchase at the register's sale. We need not determine whether the bill as it stands is multifarious.—1 Brick. Dig. 719 to 721, §§ 1158, 1159, 1162, 1168, 1172, 1179, 1183, 1191, 1192; *Ware v. Curry*, 67 Ala. 274; *Kingsbury v. Flowers*, 65 Ala. 479.

We consider it our duty to comment on another phase of this case, because it will become important in the further prosecution of the suit. The deed of Ward, trustee, when he sold under the trust-deed, made to Smith, the purchaser, and the subsequent deed of Smith to Herstein and Bernstein, both purport to be set out as exhibits to the answers of some of the defendants. If they be true copies, and we suppose they are, then Ward never did sell the north-east half, or corner lot of the Moore block; Smith never purchased it, and did not convey it to Herstein and Bernstein. The only title or claim asserted by the latter, to that north-east half of the block, is the sale and deed made by the register to them. This, as the bill now stands, produces such a variance between the allegations and what will be the proof, as to render an amendment and correction of the bill necessary. When amended, so as to correspond with the facts, it will present a clear case of multifariousness, in that it unites distinct subjects-matter, having no connection whatever.—*McIntosh v. Alexander*, 16 Ala. 87; *Mecham v. Williams*, 9 Ala. 842; *Waller v. Taylor*, 42 Ala. 297; *Clay v. Gurley*, 62 Ala. 14; *Johnson v. Parkinson*, *Ib.* 456; *Lehman v. Meyer*, 67 Ala. 396.

In sustaining the demurrer and dismissing the bill in vacation, without allowing to complainants an opportunity to amend, the chancellor erred.—*Bishop v. Ward*, 59 Ala. 253; *Kingsbury v. Milner*, 69 Ala. 502; *Stoudenmire v. DeBardelaben*, 72 Ala. 300; *Shackelford v. Bankhead*, 72 Ala. 476.

Reversed and remanded.

BRICKELL, C. J., not sitting.

[Pickett v. Doe, ex dem. Pope.]

Pickett v. Doe, ex dem. Pope.

Ejectment by Devisees in Remainder, against Purchaser from Tenant for Life.

1. *Sale of absolute property by tenant for life; effect on remainder.*—The principle decided in the case of *King v. Broome* (10 Ala. 819), and followed in several other cases (*Price v. Tally*, 18 Ala. 21; *Walker v. Fenner*, 28 Ala. 367; *Thrasher v. Ingram*, 32 Ala. 645), as to the effect of a sale of the entire property by a tenant for life on the estate and rights of a vested remainder-man, applies only to personal property, and the court declines to extend it to cases involving real property.

2. *Adverse possession, as between tenant for life (or purchaser from him) and remainder-man.*—The possession of land by a tenant for life can not be adverse to the remainder-man; and if he sells and conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not, and can not be during the continuance of the life-estate, adverse to the remainder-man.

3. *Permanent improvements by adverse possessor.*—"Adverse possession," as the words are used in the statute which gives to the defendant in ejectment, or the statutory action in the nature of ejectment, the right to suggest upon the record that he and those whose possession he has "have had adverse possession" for three years before the commencement of the suit, and have erected permanent improvements on the land (Code, §§ 2951-54), "must be construed to mean just the same character of hostile possession as will put in operation the statute of limitations, except that it must be *bona fide* under color or claim of title;" and a purchaser from the tenant for life, though his deed purports to convey the absolute property, can not claim the benefit of the statute, in an action brought by the remainder-man within three years after the death of the tenant for life.

4. *Substitution of complaint.*—A complaint may be substituted, when the original has been lost or mislaid, on proof of the correctness of the substitute and its substantial correspondence with the original; and a difference between the two in the description of the land sued for is no objection to the allowance of the substitute, when there is no dispute as to the identity of the land in controversy.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAS. E. COBB.

This action was brought by Mrs. Lydia H. Pope and others, children of Mrs. Mildred A. and George G. Holcombe, deceased, and grandchildren of George R. Clayton, deceased, against Mrs. Sarah J. Pickett, to recover a tract of land particularly described in the complaint; and was commenced on the 26th January, 1870. The land sued for was situated in or near the city of Montgomery, in the square bounded north by Mildred street, east by Amanda street, and west by the "Old Plank-road;" and it extended 400 feet north and south, by 290

[Pickett v. Doe, ex dem. Pope.]

feet in width, through the entire square. On a former trial of the case, there was a verdict and judgment for the defendant; but the judgment was reversed by this court on appeal, and the cause was remanded, as shown by the report of the case. *Doe, ex dem. Pope v. Pickett*, 65 Ala. 487-95. On the second trial, as the bill of exceptions in the present record shows, the original complaint having been lost or mislaid, the plaintiffs asked leave to substitute a paper which was produced, and which, as one of plaintiffs' attorneys testified, "was a substantial copy of the original complaint, which he had drawn, and which contained a description of the land sued for substantially the same as contained in the original complaint." The defendant objected to this evidence, "on the ground that better evidence was obtainable; and in support of said objection, offered in evidence the transcript of the record in this cause, duly certified by the clerk of this court, and sent to the Supreme Court on the former appeal, and which contained what purported to be a copy of the original complaint." In this original complaint, as set out in the transcript, the land was described as "commencing 600 feet *north* of the corner of Mildred street and the old plank-road, and running *north* 400 feet;" while in the paper offered as a substitute it was described as "commencing 600 feet *south* of the corner of Mildred street and the old plank-road, and running *south* 400 feet." The court overruled the objection to the evidence, and the defendant excepted; and this being all the evidence adduced, the court allowed the substitute to be filed as the complaint in the cause, and the defendant excepted to its allowance. The defendant then pleaded not guilty, and "suggested upon the record adverse possession for three years and the erection of permanent and valuable improvements;" and a trial was had on issue joined on these pleas.

The case was tried on an agreed statement of facts, in substance as follows: George R. Clayton, the maternal grandfather of the plaintiffs, died in Baldwin county, Georgia, in October, 1840, being seized and possessed of the quarter-section of land in and near the city of Montgomery which embraced the premises now sued for. By his last will and testament, said Clayton devised and bequeathed all his property to his children, seven in number, and directed that it should be divided among them by an amicable allotment; and the will then contained these provisions: "Whenever the parts or shares of my children shall have been set off, allotted, or ascertained, upon division as before directed, it is my will and desire, that my daughters, Caroline, Mildred and Amanda, have each a life-estate in the respective shares falling to them, and the remainder to their children respectively, upon the determination of such life-estate. It is

[Pickett v. Doe, ex dem. Pope.]

my will, moreover, that such several life-estates as are hereby given shall in no event be subject to any debt or contract of their respective husbands, or capable of being alienated by their husbands, or in any other manner than by a decree of a court of equity, and then for the necessary support of my daughters, or either of them." Said will was duly proved and admitted to probate, before the proper court in Georgia, on the 30th October, 1840; a copy thereof, with probate, &c., "was recorded in the office of the clerk of the County Court of Montgomery county, Alabama, on the 15th June, 1841;" and on the 3d November, 1846, on the application of said Amanda and her husband (Joseph W. Wilson), said will was probated in said County Court of Montgomery." In 1842, a portion of said quarter-section was surveyed and subdivided into seven lots, for the purpose of making a division pursuant to the terms of the will, and these several portions were divided by lot among the several children. Under this division, "each of said devisees named in the will took possession of the respective lots so allotted to them respectively, said Mildred, the wife of George G. Holcombe, taking possession of lot No. 7," the premises here sued for.

On May 16th, 1845, Mrs. Holcombe and her husband sold and conveyed said land, on the recited consideration of \$1,100 in hand paid, to E. S. Dargan; the deed describing the land as "Lot number seven, as laid out and surveyed by Reuben Emerson, county surveyor, being a portion of the land that was of George R. Clayton, deceased, and which lot of land was allotted to the said Mildred A. Holcombe by the commissioners appointed to divide the land amongst the heirs at law of said Clayton." The deed used the ordinary words of conveyance, and contained the following covenant of warranty: "And the said Mildred A. and George G., for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part, their heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and defend." On the 1st June, 1848, Dargan and wife conveyed the land by deed, with covenants of warranty, to F. M. Gilmer; "and the defendant holds said land, by mesne conveyances with warranty, under said Gilmer." It was admitted, also, "that defendant and those under whom she holds purchased said property for full value, in good faith, and without any actual notice of the title of the plaintiff's lessors, and erected valuable improvements on said land before the commencement of this suit; that said defendant and those through whom she claims, from E. S. Dargan inclusive, held possession under their respective deeds,

[Pickett v. Doe, ex dem. Pope.]

claiming to be owners; that said Holcombe and wife, Wilson and wife," and the other children of Clayton, "resided in the city of Montgomery from 1842 to 1850, and were well known to said Dargan and Gilmer when they purchased as above stated." Mrs. Mildred Holcombe died in May, 1867, and the plaintiffs were her surviving children, their names and ages being stated. "It was proved, also, that said lot of land was improved by defendant's vendor, in 1852 and 1853, by the erection of a dwelling, out-buildings and fencing; that said improvements are now worth \$3,000; that the rent of the premises from the commencement of the suit, with the improvements, was worth \$3,000, but without the improvements not exceeding \$150."

"There was no conflict in the evidence, and the parties consented that the court might charge directly on the evidence. The court charged the jury, on the request of the plaintiff, that, if they believed all the evidence, the plaintiff was entitled to recover the possession of the land sued for, and was entitled to recover whatever the evidence showed was a reasonable rent of the premises, as improved, from the commencement of the suit; to which charge the defendant excepted. The plaintiff conceded that the value of the improvements erected on the land by the defendant, or by those under whom she holds, could be set off by the jury against the rents of the premises, as they may find the same, and the court so charged the jury; to which charge the defendant excepted. The court charged the jury, also, that, under the evidence, the defendant did not hold adversely to the plaintiffs for three years next before the commencement of this suit, under the suggestion of record; to which charge the defendant excepted. The defendant requested the court, in writing, to charge the jury, that if, from the evidence, they find that the defendant and those through whom she claims, under the deeds set out in the evidence, had been in the actual possession of the premises sued for, for more than three years next before the commencement of this suit, claiming the same adversely in good faith, and that she and those through whom she claims had made valuable and permanent improvements on the land before the plaintiffs' right to the possession accrued; then the jury must find the suggestion of adverse possession true, although she and those under whom she claims bought from the tenant for life. The court refused to give this charge, and the defendant excepted to the refusal."

The admission of the evidence objected to, the allowance of the substituted complaint, the several charges given, and the refusal of the charge asked, are now assigned as error.

WATTS & SONS, with whom was J. GINDRAT WINTER, for ap-

[Pickett v. Doe, ex dem. Pope.]

pellant.—1. The right to claim the value of permanent improvements erected in good faith, which is given by statute to the unsuccessful defendant in ejectment (Code, § 2951), is made to depend upon his adverse possession for three years before the commencement of the suit, without regard to the value of the plaintiff's claim or title, or the time when his right of action accrued. The statute does not define the meaning of the words "adverse possession," and they must taken in their common legal acceptation. One who is in possession, claiming for himself, is an adverse holder against the world.—*Riggs v. Fuller*, 54 Ala. 141; *Pillow v. Roberts*, 13 How. U. S. 477; *Saltmarsh v. Crommelin*, 24 Ala. 347. The former statute was so construed, which was substantially the same.—*Lamar v. Minter*, 13 Ala. 31; *Hollinger v. Smith*, 4 Ala. 367. That the defendant's remote vendor, Dargan, claimed under a conveyance from the tenant for life, which purported to convey the absolute property, does not change the character or nature of the possession acquired and held under it. The possession of the tenant for life is the possession of the remainder-man; and whenever the possession becomes adverse to the tenant for life, it is necessarily adverse to the remainder-man, although he has no right of action, and therefore the statute of limitations does not begin to run against him, until the termination of the life-estate. In the case of personal property, it has been several times decided by this court, a sale of the entire property by the tenant for life converts the remainder into a mere *chose in action*, and prevents the marital rights of the husband from vesting.—*King v. Broome*, 10 Ala. 819; *Walker v. Fenner*, 28 Ala. 367; *Price v. Tally*, 18 Ala. 21; *Thrasher v. Ingram*, 32 Ala. 645; *Lide v. Taylor*, 17 Ala. 270. These decisions are all based on the analogies drawn from the law of real property, and their authority has never been questioned. Under our statutes, it is true, the tenant for life, attempting to convey the fee, does not produce a discontinuance of the estate in remainder, nor work a forfeiture of the life-estate—his conveyance only passes his own estate.—Code, §§ 2192, 2196. But the statutes, while limiting and defining the estate and title of the purchaser, do not affect the character of his possession. The question of title does not enter into the question of adverse possession, and the right to claim the value of permanent improvements is not given to him who has the better title, and who does not need the aid of either. The statute is intended for the benefit of him who, without title, has made permanent improvements in good faith, believing that he had title. It is a remedial statute, resting on the broadest equity, and should receive the liberal construction which similar statutes have received in other States.—*Longworth*

[Pickett v. Doe, ex dem. Pope.]

v. Wolfington, 6 Ohio, 10; *Davis v. Powell*, 13 Ohio, 320; *Dothage v. Stewart*, 35 Mo. 253; *Wales v. Coffin*, 100 Mass. 177; *Bright v. Boyd*, 1 Story, C. C. 495; 2 *Ib.* 605; *Pugh v. Bell*, 2 T. B. Monroe, Ky. 130; *Sanders v. Wilson*, 19 Texas, 194; *Strong v. Hunt*, 20 Vermont, 617; *Whitney v. Richardson*, 31 Vermont, 300; *Ross v. Irving*, 14 Illinois, 176; *Jones v. Perry*, 10 Yerger, 59; *Bedell v. Shaw*, 59 N. Y. 49; *Kraus v. Means*, 12 Kansas, 338; *McLaughlin v. Barnum*, 31 Md. 425; *Bellows v. McCartee*, 20 N. H. 515; *Plimpton v. Plimpton*, 12 Cush. Mass. 458; *Christie v. Gage*, 71 N. Y. 189; *Cole v. Johnson*, 53 Miss. 102; *Green v. Dixon*, 9 Wis. 539-40; *O'Byrne v. Feely*, decided by the Supreme Court of Georgia in January, 1883.

2. The substituted complaint was an entire departure from the original complaint, claiming an entirely different tract of land; one lying north, and the other south of a specified line. It was equivalent to the commencement of a new action, and ought not to have been allowed.—10 B. Mon. 88; 3 Ired. Eq. 35; 11 Geo. 594; *King v. Avery*, 37 Ala. 169; *Mohr v. Lemle*, 69 Ala.

H. C. TOMPKINS, with whom were R. M. WILLIAMSON, and P. T. SAYRE, *contra*.—1. To entitle the defendant in ejectment to claim the value of permanent improvements erected on the land, he must show that he and his vendors or ancestors have had “adverse possession” for three years before the commencement of the suit. The adverse possession here meant, unlike that which would entitle him to claim the benefit of the statute of limitations, must be *bona fide*.—*Lamar v. Minter*, 13 Ala. 31; *N. O. & S. Railroad Co. v. Jones*, 68 Ala. 48. The deed of Holcombe and wife to Dargan refers to Clayton’s will as the source of title, and charges the purchaser with knowledge of its provisions (*Wilson v. Wall*, 34 Ala. 288; *Johnson v. Thweatt*, 18 Ala. 741; *Witter v. Dudley*, 42 Ala. 616); and having this constructive notice of the rights of the remainder-men, the purchaser’s claim was not *bona fide* as against them. Nor could his possession become adverse to the remainder-men, during the continuance of the life-estate. The conveyance of the tenant for life, whatever its words or form, conveyed only his interest, and had no effect on the estate or rights of the remainder-men.—Code, § 2196; Clay’s Digest, 156, §§ 30, 35; *Smith v. Cooper*, 59 Ala. 494; *Pope v. Pickett*, 65 Ala. 487. The possession of the tenant for life was the possession of the remainder-man, and could not become adverse to him; and the purchaser from the tenant for life acquired and succeeded only to his estate and possession. An adverse possession implies an ouster, or disseizin; and there can be

[Pickett v. Doe, ex dem. Pope.]

no adverse possession against a person who has no right of possession.—*Arnold v. Stevens*, 35 Amer. Dec. 309; 1 Lomax Dig. 622, mar.; Burrill's Law Dic., tit. *Adverse possession*; Sedgw. & Wait's Trial of Titles, § 730; *Dwyer v. Schaefer*, 55 N. Y. 446; *Clarke v. Hughes*, 13 Barb. 147; *Grant v. Townsend*, 2 Hill, 554; *Varney v. Stevens*, 22 Maine, 331. At common law, a tenant for life, having erected improvements, can not claim for them against the remainder-men. *Merritt v. Scott*, 81 N. C. 385; 5 Rich. Eq. 301; 1 Washb. Real Prop. 95, 24 a.

2. The substituted complaint was properly allowed. If the description of the land contained in the transcript had been taken, it might have been corrected on motion, the misdescription being apparent on its face, and there being no dispute as to the identity of the lands sued for.

SOMERVILLE, J.—The action is ejectment, brought by the plaintiffs as *remainder-men* of the property sued for, claiming in view of the termination of the precedent estate by the death of the life-tenant. The defendant claims title through various mesne conveyances, running back to May, 1845, all of which, including the original deed from Mrs. Mildred Holcombe, the life-tenant, purport to convey the entire fee with warranty of title. It is not denied that these several conveyances passed to defendant, and those through whom she claims, only the life-estate, and that they did not operate to convey or affect the estate in remainder. This point was so adjudged when this case was last tried before us. *Doe, ex dem. Pope v. Pickett*, 65 Ala. 487; see *Smith v. Cooper*, 59 Ala. 494, and authorities cited.

The chief point of controversy relates to a claim for permanent improvements, preferred under the provisions of sections 2951–2954 of the Code of 1876.—Rev. Code, 1867, §§ 2602–2605; Code, 1852, §§ 2201–2204. No contention arises as to the right of the defendant to set off the value of the improvements, in reduction of the *rents* recoverable by the plaintiffs. It was conceded that she had “possession under color of title, in good faith;” and this fact operated to acquit her of liability for damages, or rent, for more than one year before the commencement of the suit, under the express provisions of the statute.—Code, 1876, § 2966. The whole question in the case is, was the *possession* of the defendant *adverse* to the remainder-men, *before the termination of the life-estate*? The allowance for permanent improvements is made by the statute to depend upon the contingency, that the defendant in ejectment, and “those whose possession he has,” should, for three years next before the commencement of the suit, have had *adverse*

[Pickett v. Doe, ex dem. Pope.]

possession" of the premises sued for, or in controversy. Code, § 2951.

It is contended by appellant's counsel, that this court is committed to the view, that one who claims the full title of property, under a deed purporting to be a conveyance of the perfect title by the tenant for life, holds adversely to the remainder-man. In support of this view we are referred to the case of *King v. Broome*, 10 Ala. 819, and other subsequent cases following that decision.—*Walker v. Fenner*, 28 Ala. 367; *Thrasher v. Ingram*, 32 Ala. 645; *Price v. Tally*, 18 Ala. 21. The point settled in *King v. Broome*, *supra*, seems to be, that where a vested remainder is created in *personal property*, and the tenant for life sells the entire property to a stranger, this wrongful act operates as a discontinuance of the remainder, and converts it into a *chose in action*. Without stopping to examine the doubtful *reasoning* upon which this case was made to stand, and to which more recent decisions seem repugnant, we may observe, that it has never been adjudged to have any application to *real property*. There is something in the nature of personal property, with its portable and perishable character, which essentially distinguishes any estate or interest in it from a like estate or interest in realty. A sale of personal property, by one having a life-estate, it is true, has been adjudged not to affect the title of the remainder-man to his prejudice.—*Thrasher v. Ingram*, 32 Ala. 646; *Jones v. Hoskins*, 18 Ala. 489. And the same is true of real estate, as we have already seen.—*Smith v. Cooper*, 59 Ala. 494; *Pope v. Pickett*, *supra*. It was no doubt correctly held, too, in *Nations v. Hawkins*, 11 Ala. 859, that, if a life-tenant of a personal chattel disposes of it as his absolute property to a third person, one who owns the estate in remainder can not maintain *trover* for the conversion; but the sole reason assigned was, that he had no right to the immediate possession, which was a necessary pre-requisite to the maintenance of the action. It would seem, however, that any unlawful exercise of dominion by the purchaser over an estate in remainder, created in personal property, resulting in its injury or destruction, might be regarded as a *tort*, for which an action on the case would lie in behalf of the remainder-man. It is so intimated in the case to which we have last adverted, and the suggestion accords with the assertion made in *Broome v. King*, 10 Ala. 823, *supra*, that "the estate of a remainder-man [in a personal chattel] is a subject to be turned into a mere right of action, as any other vested estate." It is the alleged discontinuance of the remainder as such which operates to transmute its legal nature; and this is produced by a tortious and unauthorized exercise of dominion over it, at war with the rights of the owner. It is manifest that this can not be the

[Pickett v. Doe, ex dem. Pope.]

case with real property. No sale of it by a life-tenant can in any manner affect, or change the nature or *status*, of the estate in remainder. It is the effect of our statutes now, and was so at the time the various deeds were made to the property in controversy, that a conveyance made by a tenant for life, purporting to convey a greater interest than he owns, does not work a forfeiture of his estate, but passes to the grantee the property and *possession* of the grantor, all warranties by him being declared void as against the remainder-man.—Code, 1876, §§ 2192, 2196; Code, 1852, §§ 1313, 1317; Clay's Dig. 156, §§ 30, 35; Aiken's Dig. 94, §§ 32, 37; *Pope v. Pickett*, 65 Ala. 487. There can be no possible dealing with the remainder, by the tenant for life of real estate, which can operate to discontinue it, or change it into a *chose in action*. If he be guilty of waste, by doing any act to the lasting injury of the inheritance, the intervention of a court of equity is deemed adequate to his protection. Its distinguishing characteristic, like that of all other realty, is its immobility, so that it can not follow the person, as chattels may do. It is also permanent and imperishable in its nature, so that no waste or trespass upon it can change its legal *status* or relation, except as against one whose right of possession is infringed or involved. If we concede, therefore, that it is possible, strictly speaking, for an estate in remainder in *personal chattels* to be held adversely to the remainder-man, before the death of the life-tenant, the rule does not necessarily apply to *real estate*. Without seeking to disturb the authority of *King v. Broome*, *supra*, and the other cases based on it, we decline to extend the principle to cases involving real estate. It must be confined to personal chattels, or at least to property other than realty.

We recur to the question, Was the *possession* of the appellant in this case *adverse* to the plaintiffs, within the meaning of the statute, before the death of Mrs. Holcombe, the tenant for life, which occurred in May, 1867? There is much antiquated learning concerning the doctrine of *adverse possession* and *disseizin*, which was applicable to tenures existing under the Feudal System, and into a discussion of which we do not propose to enter. It was to the inherent difficulties of this subject that Lord Mansfield referred, when he declared in *Atkins v. Hord* (1 Burr. R. 60), "the more we read, the more we shall be confounded." In modern times, however, and under our system of land tenures, *adverse possession* is now understood to denote, as observed by Mr. Angell, "a *disseizin* upon which an adverse title is founded, the old term 'disseizin' being expressive of any act, the necessary effect of which is to divest the estate of the former owner."—Angell on Lim. § 385; Preston on Abs. Title, 383. A *disseizin*, anciently, was nothing

[Pickett v. Doe, ex dem. Pope.]

less than some act or mode by which the disseizor acquired the tenure, and *usurped* the place and feudal relation of the tenant. 2 Smith's Lead. Cases, 396. *Disseizin* is synonymous with *adverse possession*, and is so generally considered.—Tiedeman on Real Prop. § 693; *Magee v. Magee*, 37 Miss. 151. Mr. Preston defines it as "an ouster of the rightful owner of his seizin."—2 Prest. Abst. 284. It is defined by Littleton to be "where one enters intending to usurp the possession and to *oust* another of his freehold."—Co. Litt. 153, 238a*.

An *adverse possession*, it will thus be seen, is something more than a mere possession, accompanied with hostile claim of ownership. It is very true that, ordinarily, an actual occupancy of lands, accompanied with an open, notorious and uninterrupted claim of ownership, with intention to claim hostile to the title of the real owner, constitutes *adverse possession*. But this is so, only where the possession of the occupying claimant is hostile to the claim or right of *possession* of some one else. If there be no other person entitled to present possession, there can be no repugnancy, actual or constructive, between the mere possession of the occupant and the rights of any one else. A possession, to be *adverse*, must, in other words, operate to *disseize*, or *oust*, some other claimant of his possession or right of possession.—Angell on Lim. § 389; Sedgw. & Wait's Trial of Titles, § 729; Tiedeman on Real Prop. § 693. Hence, an *adverse possession* has been defined to be, an occupancy "which disclaims the title of the *negligent* owner."—Walk. Amer. Law (5th Ed.), 339-40. It need not, of course, be actual, so as to partake of the nature of physical force, but may as well be a constructive *disseizin* or *ouster*. But, whether the one or the other, any possession, to be *adverse*, must be *wrongful* as against some one who claims to be or is legally entitled to the possession. It must be an act so far operating to the prejudice of another as to constitute the basis of an action predicated on its wrongful or tortious nature. There can not be two hostile *possessions*, of the same property at the same time, although there may be many hostile claims. One must operate to overcome and displace the other, if the two be *adverse*. We are unable to conceive of an *adverse possession* which is not *exclusive* of the rightful owner, or does not operate to encroach upon his right of possession so as to oust or *disseize* him—Sedgw. & Wait's Trial of Titles, § 752; Angell on Lim. § 386.

The principle is everywhere well settled, that there can be no *adverse possession*, or claim of ownership, by a tenant for life, which will operate to bar the estate in remainder, under the influence of the statute of limitations, which commences to run only from the death of the life-tenant.—*Wells v. Prince*,

[Pickett v. Doe, ex dem. Pope.]

9 Mass. 509; *Doe v. Danvers*, 7 East, 321; Angell on Lim. § 415. The reason is manifest. The possession of the life-tenant must be taken to be conclusively friendly to the rights of the remainder-man. The hostility of his *claim* can not, in the absence of a hostile *possession*, be considered as an invasion of the rights of the remainder-man, and, for this reason, it can not be the ground or *gravamen* of a legal action. It is, therefore, commonly said, that the possession of one is that of the other. It is an axiomatic proposition, which requires no reasoning in its support, that there can be no incompatibility between a right which exists and one, so to speak, which does not exist. The tenant for life is entitled to actual possession of the premises of which he is enfeoffed; the remainder-man is *not* so entitled, as long as the life-tenant is living. The actual possession of the former, therefore, is rightful, and not wrongful. It is not adverse to any right of the remainder-man, but perfectly compatible with all of his rights. The latter having no right of possession, either actual or constructive, can not be *disseized*, or *ousted*, in any proper acceptation of these words.—Tiedeman on Real Prop. § 400; 2 Wash. on Real Prop. 555. In accordance with these views, we find that the most approved definitions of an adverse possession involve not only the idea of an actual, visible and exclusive appropriation of land, accompanied with an intention, openly avowed, to claim against the rightful owner, but to hold against one who is *seized*.—Angell on Lim. § 390; 2 Smith's Lead. Cases, 396; Sedgw. & Wait's Trial of Titles, § 730.

Our conclusion is, that the *adverse possession* designated in section 2951 of the Code must be construed to be just the same character of hostile possession as will put in operation the statute of limitations, except, as has been adjudged, that it must be *bona fide* under color, or other claim of title—a feature of claim not essential to perfect a bar under the statute of limitations, except in cases of constructive possession, as distinguished from an actual possession—a *possessio pedis*.—*The N. O. &c., Railroad v. Jones*, 68 Ala. 48; Sedgw. & Wait's Trial of Tit. § 775; *Smith v. Roberts*, 62 Ala. 83.

In view of this conclusion, the defendant, not being in adverse possession of the premises sued for, can derive no aid from the statute, in support of her claim for permanent improvements. Apart from the influence of the statute, it is well settled, upon principles too well defined to require discussion, that improvements put on land by a life-tenant, during his occupancy, constitute no charge upon the land, but pass to the remainder-men.—*Merritt v. Scott*, 81 N. C. 385; 2 Perry on Trusts, § 546.

The various decisions to which we have been cited by the
VOL. LXXIV.

[Preston & Co. v. Ellington; same v. Daniel.]

appellant's counsel, in support of his views, are constructions of statutory provisions in other States, which are essentially variant in meaning and phraseology from our own. Most of these "betterment acts," if not every one, to a construction of which we have been referred, seem to require only an occupancy, accompanied with a *bona fide* claim of title, and not an adverse *possession*, as our own does. This distinction is the pivotal point upon which the present case is made to turn.

There was no error committed in allowing the substituted complaint to be filed. It operated, at most, only as an amendment of the original complaint, and varied from it only as to the *description* of the land sued for by the plaintiffs. We can not see, from the entire record, that the amended description was intended to include premises other and different from those described in the original complaint, especially in view of the fact that the matter of identity is always open to the light of explanation by extrinsic evidence. The whole correction made seems to have been the substitution of *South* for *North*, which may have been a mere clerical error.—*Russell v. Erwin*, 38 Ala. 44; Sedgw. & Wait's Trial of Titles, §§ 464, 459. A correction in the description of the property sued for should not be regarded as the substitution of a new cause of action, unless it appears to be such a wide departure from the former description as to introduce a claim to other and different premises not intended to be previously claimed.—*Dowling v. Blackman*, 70 Ala. 303, and cases cited.

The judgment of the Circuit Court is affirmed.

STONE, J., not sitting.

Preston & Co. v. Ellington.

Preston & Co. v. Daniel.

Bills in Equity to enforce Vendor's Lien on Land.

1. *Vendor's lien; when assignee may enforce.*—Prior to the enactment of the statute approved February 13th, 1879 (Sess. Acts 1878-9, p. 171), the assignment of a promissory note, given for the purchase-money of land, did not pass to the assignee the right to enforce the vendor's equitable lien on the land, when the assignment was of such character that the vendor had no interest in the recovery of the debt, and would not sustain loss if it remained unpaid; the underlying principle being, that the equitable lien of the vendor was a trust chargeable upon the land for his se-

[Preston & Co. v. Ellington; same v. Daniel.]

curity and indemnity, when he had taken no independent security for the payment of the purchase-money, because one man ought not to be allowed to get and keep the lands of another without paying the consideration money; and an assignee of the notes was allowed to enforce this lien, on the principle of subrogation, only when such subrogation was necessary for the protection and indemnity of the vendor.

2. *Same; when vendor is remitted to original lien.*—The vendor's lien, although it did not pass to an assignee by delivery only, was not discharged or extinguished by the assignment; and if he again acquired the notes, he might enforce the lien as if he had never parted with them.

3. *Same; assignment by delivery, and subsequent indorsement without new consideration.*—If the notes are transferred by delivery merely, not imposing on the vendor any liability for their ultimate payment, and not passing to the assignee the right to enforce the equitable lien on the land, a subsequent indorsement or assignment in writing by the vendor requires no new consideration to support it, and clothes the assignee with full capacity to enforce the lien on the land.

4. *Parol evidence varying indorsement.*—An indorsement of a promissory note is a contract of defined legal operation and effect, and can not be varied by proof of a contemporaneous verbal agreement between the parties, not incorporated in it.

5. *Assignment of notes for purchase-money; priority of lien, as between assignees and assignor.*—Several notes being given for the purchase-money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after the assigned notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JNO. A. FOSTER.

These two cases were argued and submitted together, both in the court below, and in this court. The material facts shown by the records are these: In November, 1874, James Daniel sold a tract of land to Caswell Ellington, or to Mrs. Eliza Jane Ellington, his wife, and executed a conveyance to Mrs. Ellington; taking from said Ellington and wife, in payment of the purchase-money, their four promissory notes, for \$450 each, payable December 1st, 1875, 1876, 1877, and 1878, respectively, to said James Daniel, or bearer, each declaring on its face that it was "as a payment of land bought by him, on which he resides." In September, 1876, Daniel purchased from W. R. Preston & Co. another tract of land, at the price of \$1,500, and, in payment of the purchase-money, transferred to them, by delivery only, three of the notes given by the Ellingtons, reserving to himself the note which first fell due, and which was then past due and unpaid; and there was a verbal agreement between the parties, at the same time, that Daniel was not to be liable in any event on the assigned notes, and was to be entitled to \$40 out of the proceeds of each note when collected, being the excess above the purchase-money agreed to be paid

[Preston & Co. v. Ellington; same v. Daniel.]

by him to said W. R. Preston & Co. Afterwards, at what precise time is not shown, for the purpose of enabling said W. R. Preston & Co. to enforce a vendor's lien on the land, and without any new consideration, Daniel indorsed each of the assigned notes, by writing on the back of each these words: "I transfer the within note to W. R. Preston & Co.," to which he signed his name.

On the 22d December, 1879, Preston & Co., as the assignees of the three notes held by them, filed their bill in said Chancery Court to enforce the vendor's lien on the lands; alleging that Caswell Ellington was insolvent when he signed the notes, and that he signed them only because it was thought necessary to give them validity. A demurrer to the bill, for want of equity, was interposed by the defendants, but was overruled by the chancellor; and at the July term, 1880, in pursuance of a written agreement filed in the cause, signed by both parties, a decree was entered by consent, declaring a lien on the lands, in favor of the complainants, to the amount of \$1,200, payable in three equal annual installments, on the 1st October, 1880, 1881, and 1882, with interest from the 26th April, 1880; and ordering a sale of the lands by the register, on default being made in any of these payments. Default having been made in the payment of the first installment, the register advertised and sold the lands, pursuant to the terms of the decree, on the 1st Monday in November, 1881, F. M. Gilmer becoming the purchaser, at the price of \$1,150; and the register filed his report of the sale on the 27th January, 1882, stating that the purchase-money had been paid, and that he had executed a conveyance to the purchaser.

On the 8th September, 1881, James Daniel filed his bill in said Chancery Court, against said Caswell Ellington and wife, and against said W. R. Preston & Co., seeking to enforce a vendor's lien on the lands for the amount due on the note which he had retained. His bill alleged the terms of the contract between himself and the Ellingtons, as above stated, his transfer and subsequent indorsement of three of the notes to W. R. Preston & Co., the filing of their bill, and the proceedings had in the cause; and prayed that a prior lien on the lands be declared in his favor, and that the lands be sold for its satisfaction, as well as for the satisfaction of the decree in favor of W. R. Preston & Co.; and, also, that the sale under that decree might be restrained, by order of the court, until the final hearing under his bill. A decree *pro confesso*, under this bill, was entered against Ellington and wife; and an answer was filed by W. R. Preston & Co., in which they denied Daniel's ownership of the note held by him, and alleged its payment; and they further alleged that, at the time of the contract between

[Preston & Co. v. Ellington; same v. Daniel.]

themselves and Daniel, which was negotiated through the agency of F. M. Gilmer, said Gilmer had possession of said note, and represented that only a small balance was due on it, and agreed to waive any prior lien on the lands, in order that the lands might be first subjected to the payment of the other notes; that they were induced by these representations to accept the three notes of the Ellingtons, in payment of the purchase-money for their tract of land, with the understanding that they were secured by the vendor's lien on the land, it being well known that Ellington was insolvent; that by mistake, or oversight, the notes were not indorsed at the time they were delivered; and that the subsequent indorsement was made for the purpose of correcting this mistake, and enabling Preston & Co. to enforce the lien on the land.

The deposition of F. M. Gilmer was taken by Preston & Co., in which he stated the facts connected with the contract and negotiations substantially as alleged in their answer; and he further stated that the note held by Daniel was in fact paid and satisfied. The deposition of said Daniel was taken in his own behalf, in which he stated, in substance, that at the time of his contract with Preston & Co., through F. M. Gilmer as agent, it was agreed that the purchase-money should be "paid by the transfer by delivery of the three notes on the Ellingtons," and that he was not to be liable in any event for the payment of said notes; and that he afterwards made the written indorsement on said notes, without any consideration whatever, at the request of said Preston & Co.'s attorney, and on his assurance that such indorsement was necessary to enable them to enforce a vendor's lien on the lands, and would not render him personally liable in any manner.

In the cause of Preston & Co. v. Ellington, a petition was filed on the 28th February, 1882, by Steiner & McGehee, exhibiting an assignment to them by Ellington and wife, of the surplus proceeds of sale remaining in the register's hands after satisfying the decree in favor of Preston & Co., and praying that said surplus (\$62) might be paid to them; and on the 3d March, 1882, a petition was filed in said cause by Daniel, stating the proceedings which had been had in both of the causes, and claiming a prior lien on the proceeds of sale for the amount due on the note held by him, which was alleged to be \$325. His petition further stated, that he had given public notice of his claim at the sale by the register; that said Gilmer publicly announced at the sale that he purchased for Preston & Co.; and that Gilmer afterwards procured a conveyance to himself personally to be made by the register, "for the purpose, as petitioner believes, of securing a confirmation of the sale, if possible, to the prejudice of petitioner." The prayer of the

[Preston & Co. v. Ellington; same v. Daniel.]

petition was, 1st, that the sale by the register be set aside; or, 2d, that action on the report of sale be postponed until the next term of the court; or, 3d, that the surplus proceeds of sale, after satisfying the decree and costs, be paid to the petitioner; and, 4th, for other and further relief under the general prayer.

The two causes being submitted together, for final decree on the pleadings and proof, the chancellor held, 1st, that the transfer of the notes by Daniel to Preston & Co., by delivery merely, did not pass the vendor's lien; 2d, that the subsequent indorsement in writing, being without consideration, could neither create nor revive, in favor of the assignees, a right to enforce the vendor's lien on the land; 3d, that Daniel had a lien on the land, to the extent of the balance due on the first note; and, 4th, that the purchaser at the register's sale, not having in fact paid the purchase-money, was not entitled to a confirmation of the sale. He therefore rendered a decree, the same in each case, declaring a prior lien on the land in favor of Daniel, and ordering a reference to the register to ascertain the amount due on the note held by him; and further ordering the register not to deliver a deed to Gilmer, as the purchaser at his sale, unless the amount bid at the sale was actually paid into court within ninety days.

Preston & Co. appeal from these decrees, and here assign each part of them as error.

GUNTER & BLAKEY, for appellants.

BUELL & LANE, *contra*. (No briefs on file.)

BRICKELL, C. J.—The main question in these cases, which grow out of the same transactions, and in which the same parties are interested, may be thus stated: *First*, whether the lien of a vendor of lands, for the payment of the purchase-money, is extinguished if he transfers the notes given for the purchase-money, the nature and character of the transfer excluding his liability for the ultimate payment of the notes? If, after such transfer, without the intervention of a new consideration, the assignor, to enable the assignee to enforce the lien on the lands, indorses the notes in terms which impose upon him a liability for their ultimate payment, in the event the holder exercises due diligence to recover of the maker, and fails, can the assignee enforce the lien? Can the legal effect of the indorsement be varied by parol evidence of an agreement, contemporaneously made, that the vendor should not be made personally or pecuniarily liable for the payment of the notes?

[Preston & Co. v. Ellington; same v. Daniel.]

Prior to the statute approved February 13th, 1879 (Pam. Acts 1878-9, p. 171), which was subsequent to the present transaction, promissory notes, or other evidences of debt, given for the purchase-money of lands, when assigned, did not pass to the assignee the right to enforce the equitable lien of the vendor, if the assignment were of such nature and character that he had no interest in the recovery of the debt, and would not sustain loss if it was unpaid.—*Bankhead v. Owen*, 60 Ala. 457. The principle underlying the decisions asserting this doctrine was, that the equitable lien of a vendor who had made a conveyance of lands, the purchase-money not being paid, and an independent security for its payment not having been taken, was a trust chargeable upon the lands for the security and indemnity of the vendor, raised and enforced by a court of equity, because one man ought not in good conscience to get and keep the lands of another without paying the consideration money. The trust was raised only for the security and indemnity of the vendor; and it was upon a principle of subrogation that an assignee, claiming through him, was entitled to enforce it. The trust arising by construction or operation of law, for the personal indemnity of the vendor, a transferee, or assignee, was not subrogated to it, when subrogation was not necessary for the protection of the vendor.—*Bankhead v. Owen*, *supra*; *Hall v. Click*, 5 Ala. 363; *Grigsby v. Hair*, 25 Ala. 327. The trust or lien, however, was not discharged or extinguished by the assignment. The assignee had not an equity to enforce it, but it remained, as it was in its original creation, a trust or security for the payment of the purchase-money to the vendor; and if he subsequently acquired the notes, it was as capable of enforcement as if he had never parted with them.—*Bankhead v. Owen*, *supra*; *Green v. Demoss*, 10 Humph. 371; *Page v. Green*, 6 Conn. 338; *Lindsey v. Bates*, 42 Miss. 397; *Cotten v. McGehee*, 54 Miss. 570. We do not, therefore, assent to the proposition, which seems to be the basis of the chancellor's decree, that the original transfer of the notes by the vendor by delivery only, not imposing upon him liability for their payment, discharged or extinguished the lien upon the lands. The lien was merely suspended, while the notes remained in the hands of the assignee or transferee, who had not capacity to enforce it.

The subsequent indorsement of the notes by the vendor in writing is, in terms, a transfer of the legal title, and is a contract of specific legal import—a contract by which the vendor binds himself to pay the notes, in the event the transferee, after the exercise of the diligence the law prescribes, was unable to obtain payment from the makers. A transfer of this character, it can not be questioned, clothes the transferee.

[Preston & Co. v. Ellington; same v. Daniel.]

with full capacity to enforce the lien upon the lands for the payment of the notes. The original transfer may not have involved the vendor in liability for the payment of the notes, and no new consideration may have intervened for the subsequent indorsement. Whether the want of a consideration for the indorsement can be made the subject of inquiry, when the transferee is seeking only the enforcement of the lien upon the lands, and not the fixing upon the vendor a personal liability, it is not necessary now to consider. The subsequent indorsement was intended by the parties as an alteration or modification of the original, rather than as the making of a new contract. Before or after the consummation of a contract, the parties may alter, rescind or modify it; and to support the alteration, modification or rescission, it is not necessary that a new consideration should intervene. The mutual agreement of the parties supports it.—1 Brick. Dig. 394, § 233. If the consideration of the indorsement were now a matter upon which the rights of the parties were dependent, there is no reason for doubting that it is adequate.

The indorsement, as we have said, is, of itself, a contract of specific legal import; and there is no principle upon which it can be varied or altered by evidence of contemporaneous verbal agreements or stipulations which the parties did not incorporate into it. It may be conceded the evidence shows that the purpose of the indorsement was merely to enable the transferees to enforce the lien upon the lands, and that it was verbally agreed the vendor was not to be bound personally for the payment of the notes. It has long been settled by the decisions of this court, that the indorsement of a promissory note by the payee, whether in full or in blank, is a contract having a defined legal operation and effect, which can not be varied by parol evidence.—1 Brick. Digest, 301, § 699; *Day v. Thompson*, 65 Ala. 269.

The indorsement of the notes operating as an assignment, *pro tanto*, of the lien upon the lands, entitled the assignee to payment in priority of the note retained by the vendor, though it was in point of time first due and payable. This has been settled by repeated decisions of this court, and is the general doctrine applicable to mortgages and collateral securities for the payment of debts. The assignment of the debt, when absolute and unconditional, is an assignment *pro tanto* of the mortgage or other security; and if the fund arising from the mortgage or other security is not sufficient to pay the entire debt, the assignee has a preference over the assignor.—*Cullum v. Erwin*, 4 Ala. 252; *Nelson v. Dunn*, 15 Ala. 501; *Grigsby v. Hair*, 25 Ala. 327. The vendor, Daniel, after the indorsement of three of the notes, retaining one of them, was in the

[Wilkinson v. Roper.]

relation of a subsequent incumbrancer. The only right he could assert was to be let in to redeem, upon payment of the notes indorsed, or to take the surplus of the proceeds of the sale of the lands remaining after satisfying the notes.

A redemption is not claimed; nor is the fairness or regularity of the sale made under the decree of the court, in the suit by the appellants for the enforcement of the lien, assailed; nor is the price bid for the lands alleged to be inadequate. The only right which Daniel could assert was a right to the surplus of the proceeds of the sale remaining after satisfying the decree in favor of the appellants. A petition filed in that cause, while the fund was under the control of the court, was the proper mode of asserting the right. The right of Daniel to the surplus is, of course, superior to any claim Steiner, McGehee & Co., as assignee of the Ellingtons, can claim. There is no event in which they would be entitled, unless there was a surplus of the proceeds of sale remaining after satisfying the whole purchase-money and the costs of suit.

We perceive no reason for setting aside the sale of the lands, or for withholding confirmation of it, and ordering a conveyance to be made to the purchaser.

The result is, the decrees of the chancellor must be reversed, and decrees here rendered in conformity to this opinion.

Wilkinson v. Roper.

Bill in Equity for Redemption and Account.

1. *Whether contract is sale or lease, purchase or tenancy.*—A contract may be so framed as to operate either as a sale or as a lease—either a purchase or a tenancy; as in *Collins v. Whigham* (58 Ala. 438), where the contract was construed as giving the option to the purchaser, in the first instance, to treat it as a purchase or as a lease, and, on his failure to express his election by the day named, it was held that the vendor might elect.

2. *Same.*—Where lands are conveyed by absolute deed, with covenants of warranty, the purchaser giving his written obligations to deliver twelve bales of cotton to the vendor, in annual installments of four bales each, and a mortgage on the land to secure their payment; a stipulation in the mortgage in these words, "And in case of failure to make the first two payments on said land, then we agree and hereby promise to pay said W. [vendor] two bales of cotton each year for the rent of said lands," does not, of itself, show that the contract was a conditional sale, dependent on the payment of the first two obligations at maturity, and, on default of such payment, operating only as a lease from year to year. But the acts and conduct of the parties under the contract, as proved by receipts given and accepted, and other writings, show that they so un-

[Wilkinson v. Roper.]

derstood and regarded it, or subsequently modified it, and that the cotton delivered was paid, not as purchase-money, but as rent.

3. *Cross-bill; when relief may be granted under, though original bill be dismissed.*—The general rule is, that when the original bill is dismissed, the cross-bill goes out with it, at least when the subject-matter of the cross-bill is simply defensive of the case made by the original bill; but, when the cross-bill sets up, as it may, additional facts relating to the same subject-matter, but not alleged in the original bill, prays for affirmative relief in reference to it, and presents a case of equitable cognizance, the dismissal of the original bill does not dispose of the cross-bill: it is the duty of the chancellor in such case, while dismissing the original bill, to grant such relief under the cross-bill as would be proper, under its averments and the proof, if it were an original bill.

4. *Same; extent of relief in this case.*—The original bill seeking an account and redemption of lands mortgaged by the complainant to the defendant, as alleged, to secure the payment of the agreed purchase-money, and failing in this aspect, because the proof showed that the contract between the parties was not a sale and conveyance, with re-conveyance by mortgage to secure the payment of the purchase-money, but was regarded and acted on by them as giving the vendor an election, on default being made in the payment of the first installments of purchase-money as stipulated, to treat it as a lease from year to year, and the payments as made on account of rent; the defendant may, under a cross-bill, have the deeds cancelled, the possession of his lands restored to him, and recover damages by way of mesne profits from the time the tenancy was repudiated, thereby placing the parties in *statu quo*; and the original bill further praying an abatement of the purchase-money, on the ground that ten acres of the land in fact belonged to him at the time the contract was made, and was included in the deed and mortgage by mutual mistake, and this allegation being sustained by the proof, the original bill may be retained for this purpose, in order that complete justice may be done between the parties.

5. *Sufficiency of conveyance in description of land.*—"Ten acres off the north-west corner of said quarter-section," when the words are used to designate a tract of land, is not an indefinite and uncertain description, but means the ten acres in the corner, lying in a square, and bounded by four equal sides; but, when the only descriptive words used are, "Ten acres, more or less, of said quarter-section," the conveyance is void for uncertainty as a muniment of title.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JNO. A. FOSTER.

The original bill in this case was filed on the 6th September, 1882, by Edward B. Roper, against W. W. Wilkinson; and sought, 1st, a redemption of lands from under a mortgage, which the complainant had executed to the defendant to secure unpaid purchase-money; 2d, an account of the alleged mortgage debt, and the several partial payments made on it; 3d, an injunction of an action at law founded on the mortgage; 4th, an abatement of the purchase-money, on the statement of the account, to the extent of the value of ten acres of the land, alleged to have been included in the deed and mortgage by mutual mistake; and, 5th, other and further relief under the general prayer. The contract between the parties was consummated on the 27th June, 1874, when Wilkinson and wife exe-

[Wilkinson v. Roper.]

cuted and delivered to complainant a conveyance to the land, with covenants of warranty, reciting the present payment of \$750 as its consideration; and complainant and his wife executed and delivered to said Wilkinson their several written obligations, each binding them to deliver to said Wilkinson or bearer, on the 1st October, 1875, 1876, and 1877, respectively, "four bales of lint-cotton, to class L. M., and to weigh 500 lbs. each, for land;" and they also executed a mortgage on the land, with power of sale, to secure the payment of these obligations, and containing an additional stipulation in these words: "And we further agree, that in case of failure to make the first two payments on said land, then we agree and hereby promise to pay the said W. W. Wilkinson two bales of cotton each year for the rent of said land." Copies of the deed, mortgage and written obligations were made exhibits to the bill. The complainant alleged in his bill that he had paid and delivered more cotton than was due under his contract, and offered to pay any balance that might be found due on the statement of the account; and he claimed an abatement of the purchase-money, on the statement of the account, on the ground that ten acres of the land embraced in the deed and mortgage belonged in fact to him at the time the contract was made, and was included in the conveyances by mutual mistake.

An answer to the bill was filed by Wilkinson, admitting the correctness of the exhibits to the bill, denying that the complainant had any right of redemption under the terms of the mortgage, and insisting that since the 13th December, 1875, default having been made in the payment and delivery of the cotton as stipulated, the complainant had been in possession of the land only as his tenant. He asked that his answer might be taken as a cross-bill, and prayed "that whatever title to said land may be vested in the said Edward B. Roper or his wife, the said R. A. T. Roper, may be divested by the decree of this court, and vested in this defendant; that an account may be had and taken of the rents due to this defendant by the said Edward B. Roper, and he be decreed to pay the amount so found due," and for other and further relief.

On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, and ordered an account as prayed; and his decree is now assigned as error.

JNO. GAMBLE, and J. C. RICHARDSON, for appellant.—The deed and mortgage are to be construed together, as parts of one and the same contract, and as evidencing the entire contract between the parties. Thus construed, the option was given to Roper, in the first instance, to treat the transaction as a conditional sale, or as creating a tenancy; and his election having

[Wilkinson v. Roper.]

been manifested, the character of the contract became fixed and irrevocable, unless changed by the mutual consent of the parties. Having elected to treat it as a tenancy, as clearly shown by the subsequent dealings between the parties, Wilkinson could not have treated it as a mortgage—could not have foreclosed it in equity, and recovered a personal decree against Roper for any balance of purchase-money unpaid. The parties had a right to make their own contracts, and a court of equity will enforce them as made.—*Collins v. Whigham*, 58 Ala. 438; *Sewall v. Henry*, 9 Ala. 30; *Peebles v. Stolla*, 57 Ala. 58; *Haynie v. Robertson*, 58 Ala. 39.

STONE, J.—*Collins v. Whigham*, 58 Ala. 438, is an authority for holding that parties may contract in reference to land, with the option of treating it as a sale, or a lease—a purchase, or a tenancy. The writing in that case fully expressed the terms of the contract. Construing it, we held that the purchaser, in the first instance, had the option of paying three bales of cotton, the first installment, and thus constituting the contract a purchase, or of paying two bales, and thereby constituting it a tenancy. Failing to express his election, by performing either of the alternative obligations on the day named, we held that the vendor was then clothed with an option to treat the transaction as a sale or lease. The writing in that case, as we have said, fully expressed the terms of the contract, and was only an obligation to make title, in the event the purchaser entitled himself to it by paying the purchase price.

The present case is very different in its facts. Wilkinson and wife conveyed the land to Roper by absolute deed, with full covenants of warranty, on the day of the contract. On the same day, Roper executed to Wilkinson his three obligations, binding himself in each to deliver to Wilkinson four bales of cotton, in all twelve bales, in installments due severally 1st October, 1875-6-7; and to secure their payment, he and his wife executed their contemporaneous mortgage on the lands, containing a power of sale on default. Up to this point, there is nothing in this case to distinguish it from an ordinary sale and conveyance of lands, with return mortgage taken to secure the purchase-money. Not a word of condition in the sale anywhere expressed. After the contract was made complete to this extent, the following clause was added to the mortgage: "And we further agree that, in case of failure to make the first two payments on said land, then we agree and hereby promise to pay the said W. W. Wilkinson two bales of cotton each year for the rent of said lands." Under this clause it is contended for appellant, Wilkinson, that it was only a conditional sale, dependent on the payment by Roper of the two installments

[Wilkinson v. Roper.]

of the purchase-money first to mature; and if those two installments were not paid, then there would be no sale, but only a lease to Roper of the premises, at the agreed yearly rental of two bales of cotton; and Roper having failed to pay the first two installments, the contention is, that Roper has been in only as tenant from year to year.

Viewed in the light of these writings, it would be very difficult to work a conditional sale out of this transaction. The title was passed absolutely to Roper, by Wilkinson's deed. True, it was mortgaged back on the same day; but, in equity, this was only a security for the payment of the purchase-money. As to all the world, except Wilkinson, the freehold was in Roper. To vest a complete, indefeasible legal title in Wilkinson, there must have been a foreclosure of the mortgage, a reconveyance by Roper, or a release or conveyance of the equity of redemption. Without one of these, Wilkinson had no title that could maintain ejectment against any one except Roper, or those holding in his right. This is certainly an unusual condition of the title, if the intention was only to make a conditional sale, or to create a tenancy; and, to give to the words appended to the mortgage, which we have copied above, the effect of converting a solemn deed of bargain and sale, executed, acknowledged and recorded, into a lease from year to year, determinable at pleasure, would be to incorporate in the instrument a stipulation which the parties have failed to express.—2 Brick. Dig. 248, § 4. In doubtful cases, the law presumes a conveyance was intended as a mortgage security, rather than a sale with a condition to re-purchase.—*McNeill v. Norsworthy*, 39 Ala. 156.

But we are not left to the deed and mortgage alone, as guides in the interpretation of this contract. Roper failed to pay the first two installments of four bales each, at the time of their maturity; but he made annual payments, sometimes of two bales, and sometimes of less. These were receipted for, sometimes as rent, and sometimes simply "on account of land," without expressing whether it was purchase, or rent money. In 1876, three bales were delivered; but the excess over two bales—1,000 lbs.—was accounted for to Roper, partly in cash, but mainly in a credit on account. In 1877, there was no excess over two bales, except one dollar, applied to recording. In 1878, there was an excess over the two bales, of 188 lbs. This was applied to open account. There is proof that Roper obtained advances from Wilkinson. Now, all these payments, and their application, are shown by documentary proof, testified to by Roper himself, and made exhibits to his deposition.

But there is stronger evidence than this, testified also by Roper, and appended to his deposition as an exhibit. Bearing

[Wilkinson v. Roper.]

date February 18th, 1878, Roper executed a written agreement in the following terms, "November 1st after date, I promise to deliver to W. W. Wilkinson, or bearer, two bales of lint-cotton, to class low-middling, and to weigh five hundred pounds each, put up in good order, and delivered in Greenville, Ala., for the rent of land; with this understanding and agreement, that if I can pay the balance purchase-money on said land, then the value of the two bales of cotton shall go to make up said payment, and be applied to part of said purchase-money, instead of rent. Also, twenty-five dollars more for rent." Signed "*E. B. Roper*," and witnessed. Recurring to the account of cotton received by Wilkinson from Roper during that year, as testified to by Roper, we find two bales cotton, weighing severally 634 and 584 lbs.—1188 lbs.—with this language appended: "Rec'd on a/c of land 1000 lbs.; 188 at 9c., \$16.90 paid on open a/c." Signed, "*W. W. Wilkinson*." This paper bears date Sept. 24th, 1878. These papers prove conclusively that the parties understood and acted on their contract, in the sense claimed by Wilkinson; and the indefinite contract of 1874 is made certain and unmistakable by the extension contract of 1878. There being a failure on Roper's part to pay the first two installments, and also a failure of proof that he paid "the balance of the purchase-money on said land," provided for in the extension contract copied above, we feel bound to hold, that the payments made by him have been as rent, under the last clause of the mortgage, and not as purchase-money.

The complainant has failed to show a case entitling him to relief, so far as the main object of the bill is concerned. We reserve, for the present, what we have to say of the complainant's claim, that ten acres of the land in controversy belonged originally to him, and were embraced in the deed and mortgage by mutual mistake.

We have shown that the main purpose of the bill must fail, for want of proof. We will consider the question of the cross-bill, without any reference to the other and minor feature of the complainant's case; in other words, as if the original bill were dismissed. The general rule is, that when the original bill is dismissed, the cross-bill goes out with it.—*Dill v. Shahan*, 25 Ala. 694; *Con. Life Ins. Co. v. Webb*, 54 Ala. 688. This is certainly the case, when the subject-matter of the cross-bill is simply defensive of the case made by the original bill. But, when the cross-bill sets up, as it may, additional facts relating to the subject-matter, not alleged in the original bill, and prays for affirmative relief against the complainant, in a matter which is the subject of the original bill, if such cross-bill present a subject of equitable cognizance, the dis-

[Wilkinson v. Roper.]

missal of the original bill does not dispose of the cross-bill. The latter remains for disposition, as if it had been filed as an original bill.—2 Dan. Ch. Pr., 5th Ed., 1553*, note 3. In *Ragland v. Broadnax*, 29 Grat. 401, 420, the court, speaking of a cross-bill and its subject matter, said: "This was so connected with the matter of the original bill, as to be a proper subject of a cross-bill, but at the same time a matter of which the jurisdiction of the court could not be ousted, by a dismissal of the original bill." So, in *Dewees v. Dewees*, 55 Miss. 315, the court said: "When the proof taken had established the truth of her [the defendant's] statements, and the falsity of his [the complainant's], the chancellor, properly we think, retained the cross-bill, in order that he might afford her this independent relief." In this case, the subject and prayer of the cross-bill were intimately connected with the subject of the original suit. In *Wickliffe v. Clay*, 1 Dana, 585, Clay, the complainant, had prayed for specific performance of a contract, and Wickliffe, by cross-bill, sought its rescission. Clay, after evidence was taken, dismissed his bill. In a most elaborate opinion by ROBERTSON, C. J., we find this language: "Clay's subsequent dismissal of his bill did not affect Wickliffe's cross-bill." See, also, Story's Eq. Pl. § 391; *Lowenstein v. Glidewell*, 7 Cen. Law Jour. 167; *Chicago A. W. Co. v. Conn. Life Ins. Co.*, 57 Ill. 424; *Camden & A. R. R. Co. v. Stewart*, 18 N. J. Eq. 489. In the case of *Gilman v. Selma & N. O. Railroad Co.*, 72 Ala. 566, no relief was obtained on the original bill, yet very important relief was granted under the prayer of one of the cross-bills.

We need not say to what extent we approve what is said in some of the cases from which extracts are given above. What we approve and affirm is, that if the averments of the cross-bill relate to, and spring out of the subject embraced in the original bill, when such cross-bill prays affirmative relief which is equitable in its character, and which requires a cross-bill for its presentation, if the cause, in this condition, is submitted for decree, then, although all relief may be denied on the original bill, it is the duty of the chancellor to grant such relief on the cross-bill as its averments and the proofs would justify, if they were presented in an original bill. The dismissal of the original bill, in such case, does not necessarily, or properly, carry with it the cross-bill.

Recurring to the minor feature and purpose of the original bill: When we first announced our opinion in this case, an incongruity in the pleadings, in reference to this minor phase of the case, eluded our attention. It has not been presented in argument, either before or since the decision; nor has there been a formal application for a re-hearing. A difficulty arose

[Wilkinson v. Roper.]

in the matter of carrying out our decree as first rendered, of which we were informed by the chancellor, and by counsel. This caused us to scrutinize the record more closely. This scrutiny disclosed the incongruity to which we have referred.

The main feature of the bill, disposed of above, was an application by the mortgagor to redeem the mortgaged premises. Roper purchased lands from Wilkinson, and received from him a conveyance, describing the lands by Government-survey numbers. Contemporaneously Roper reconveyed the same lands, by the same description, to Wilkinson, as security for the purchase-money. Among the lands thus conveyed and reconveyed was the south-west quarter of the north-west quarter of section 29, township 10, range 15 east. This, it will be observed, is a tract of forty acres—the south-west forty of the quarter-section. The original bill alleges that Wilkinson, in making the sale, represented that he owned all the lands he conveyed, and that in this he was mistaken to the amount of “ten acres of the lands off the north-west quarter” of said forty, which did not belong to said Wilkinson, he having no title or claim thereto. The bill then alleges, “that said ten acres of land did, at the time, belong to him [complainant], and that he was in possession of the same, and held good and sufficient title thereto; and that he, complainant, was also mistaken, and did not find out his error for a long time after said sale to him by Wilkinson.” This charge is found in the 6th section of the bill. In the foot-note, sworn answer of the defendant is dispensed with.

The special answer to this averment of the bill is, “Defendant denies that he ever conveyed, or attempted to convey, by said deed, a copy of which is made Exhibit A to the original bill, the alleged ten acres of land off the north-west corner of the north-west quarter of section twenty-nine.” Comparing the numbers, it will be seen this is no denial of the averment of the bill. The bill claims ten acres off the north-west corner of south-west quarter of north-west quarter. The denial is, that defendant did not convey, or attempt to convey, ten acres off the north-west quarter of section twenty-nine. These two statements can not relate to one and the same ten acres. So, in this part of the answer, the averment of the bill under discussion is not denied. There is, however, another clause of the answer, as follows: “And further answering, this defendant denies every other matter, cause, or thing in the said complainant’s said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or already denied.” The answer being without oath, and only pleading, this must be treated as a

[Wilkinson v. Roper.]

sufficient denial of the mistake in the numbers of the land, alleged in the bill. The duty was then cast on the complainant of proving the mistake averred in his bill.

Is the averment of the bill, descriptive of the ten acres alleged to have been inserted by mistake, sufficiently definite, or is the description void for uncertainty? It will be remembered, the language is, "ten acres of the land off the north-west corner," of a named sub-division. Can this land be found and located? That is the question.—*Chambers v. Ringstaff*, 69 Ala. 140; *Meyer Bros. v. Mitchell*, at the present term. We have made a pretty thorough search, and have found only a single adjudication on this question.—*Owing v. Morgan*, 4 Bibb (Ky.), 274. In that case, a sale had been made of one thousand acres off a five thousand acre tract, to be selected off the "side, edge or corner, as might best suit S. M." Speaking of the manner of selection, the court said: "Notwithstanding the appellants, according to the contract with Myers, had a right to elect to take the land out of any side, edge, or corner of the 5,000-acre tract, we can not suppose it to have been the understanding of the parties that the figure of the land should depend upon the whim or fancy of the person making the election; but, whenever the side, edge or corner be designated, if a side or end, lines should be extended so far from the parallel to the side or end lines, as, by passing through the survey of 5,000 acres, would include the quantity; and if a corner, lines should be extended equal distances so far on the side and end lines, as, by running lines at right angles therewith, would include the quantity." This rule is eminently just, for it can not be supposed that either seller or buyer contemplated, that by the selection either tract should present a fanciful, capricious, or unique figure. We think the description given in the bill is sufficient. It calls for a quadrangle, of equal sides, extending to the north-west corner.

Complainant's averment of the mistake in the writings, and his prior ownership of the ten acres, being, as we have seen, denied, it became necessary for him to prove this averment of his bill. Notwithstanding defendant's attempted special denial of this averment is no denial at all, and notwithstanding the defendant, though examined as a witness for himself, failed to testify as to the alleged mistake; yet, the burden rested with complainant to establish this averment. He attempted to do it. He put in evidence a deed made to him by Mosely, bearing date November 8th, 1868; but the description of the land in that deed is, "ten acres, more or less, of the south-west fourth of the north-west fourth of said section twenty-nine." This testimony tends to prove that Roper had a prior conveyance of about ten acres of the identical forty acres, which, in its entirety,

[Wilkinson v. Roper.]

was afterwards conveyed by Wilkinson to him. But it does not describe or designate the ten acres thus previously conveyed to him by Mosely. It does not show it lay in the north-west corner of the forty, and, hence, does not sustain the averment of the bill. It is void for uncertainty, as a muniment of title to the ten acres claimed, but gives intimation, perhaps, that Wilkinson only owned thirty of the forty acres contained in this quarter-quarter-section. This proof, unaided, is not sufficient to entitle complainant to relief, as to this ten acres.

Roper, as a witness, was interrogated on this question. In his answer, he says, in substance, that he purchased the ten acres in the north-west corner of said forty-acre tract—the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 29—from Mosely, in 1868, went into possession of it, and remained in possession of it ever since; that he accepted a deed to said ten acres from Wilkinson, through ignorance, and did not find out the error until the spring of 1882, when it was pointed out to him by the tax-assessor. The deed from Wilkinson to Roper was made in June, 1874.

It will be borne in mind that, in its primary aspect, this was a bill by Roper to redeem lands mortgaged by him to Wilkinson, to secure payment of the purchase-money of the same land, less the ten acres, sold by Wilkinson to him. By the terms of the contract, as we have shown, the transaction was to be a purchase by Roper, if he met the installments. Failing, it was to be a tenancy, at an agreed rent. We have further shown that the purchase failed, by Roper's failure to meet the installments of purchase-money. The controversy has thus narrowed down to one between landlord and tenant, but having incumbering titles outstanding. The relief, and only relief, Wilkinson can obtain under his cross-bill, is to have the title papers cancelled, the possession of his *own* lands restored to him, and damages by way of mesne profits for the detention of his lands, from the time Roper ceased to be his tenant rendering rent. He can recover nothing as mortgagee, for there is no subsisting contract of purchase, no purchase-money due, and therefore no debt to uphold a mortgage.—*Peebles v. Stolla*, 57 Ala. 53. Renouncing the sale, and asserting a lease—demanding and receiving rent as rent—is, under the facts of this case, the equivalent of a denial that any purchase-money is due. Hence, the cross-bill can be maintained, only as a means of having the titles cancelled, and the contracting parties placed in *statu quo*. It results from this, that Wilkinson can not claim any lands not owned by him before his contract with Roper.

Under the pleadings in this cause, and under the testimony of Roper—Wilkinson offering no testimony whatever on the

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

question—we feel bound to hold, that Wilkinson did not own the said ten acres of land claimed by Roper to have been inserted in the deed by mistake, and that this averment of the bill is sufficiently proved. It results, that the complainant's bill fails except as to the ten acres. As to that, complainant is entitled to relief. Only the Chancery Court has power to have Wilkinson's deed and Roper's mortgage surrendered up and cancelled. The Chancery Court has thus acquired jurisdiction of the subject-matter, and may retain it and do complete equity between the parties.—1 Brick. Dig. 639, § 5. It is, perhaps, better that that course should be pursued in this case.

It being necessary to make orders in reference to the cancellation of papers, which can be more advisedly done in the court below, we will not render a final decree. We will reverse and remand the cause, that the chancellor may proceed with it in accordance with the principles herein above declared. Should amendments, or other interlocutory orders be deemed necessary, we leave that question to the discretion of the chancellor. Let the costs of appeal be paid, two-thirds by Roper, and one-third by Wilkinson.

Reversed and remanded.

East Tenn., Va. & Ga. Railroad Co. v. Bayliss.

Action against Railroad Company, for Injuries to Stock.

1. *Burden of proof as to negligence.*—In an action against a railroad company, to recover damages for injuries to stock, when the fact of injury by the defendant or its servants has been shown, a *prima facie* case is made out for the plaintiff, and the *onus* is then cast on the defendant "to acquit itself of negligence, or to show a compliance with the statute;" that is, if the injury occurred at one of the places specified in the statute, and under the circumstances therein detailed, a compliance with the requisitions of the statute must be shown; and if under other circumstances, the evidence must be sufficient to satisfy the jury that it occurred without such negligence as, under the general law governing the doctrine of negligence, would render the defendant liable.

2. *Same; legislative adoption of judicial construction of statute.*—This doctrine was laid down in the case of *Mobile & Ohio Railroad Co. v. Williams* (53 Ala. 595), and has since been followed in several other cases; and the statute then construed (Rev. Code, §§ 1399, 1401) having been carried without change into the Code of 1876 (§§ 1699, 1700), this is a legislative adoption of that judicial construction.

3. *Appraised value of animal killed, as admission against owner, and explanation thereof.*—The plaintiff having procured appraisers to value his horse which was killed, and to certify to the correctness of his claim

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

at their valuation against the railroad company, this appraisement is an admission on his part of the value of the horse as stated; but it is subject to be explained, or rebutted, by proof of any fact connected with the appraisement which is admissible as a part of the *res gestæ*; as, that he told them to put the lowest cash value on the animal, not exceeding the sum fixed by them, because the agent of the railroad company had promised that the claim should be paid at once without abatement.

4. *Objection to question and answer.*—When a question calls for irrelevant or illegal evidence, and the answer to it is illegal or irrelevant, an objection to the question is sufficient to exclude the answer; but, where the answer is not strictly responsive to the question, though apparently suggested by it, the objection to the question does not cover the independent matter thus elicited.

5. *Service of process on agent, for corporation.*—In an action against a railroad company, for injuries to stock, the summons and complaint may be served on a "depot-agent" (Code, § 1714), without the affidavit required (*Id.* § 2935), in other actions against corporations, when the service is on any other person than the "president, or other head thereof, secretary, cashier, or managing agent."

6. *Presentment of claim, and limitation of action.*—A claim for damages against a railroad company, for stock killed or injured, is "barred, unless complaint is made within six months after such killing or injury" (Code, § 1711); but a presentment of the claim in writing, within the six months, to the president, treasurer, superintendent, depot-agent, or agent specially appointed to look after such claims, is sufficient to avoid the bar, although suit is not commenced until after the lapse of six months.

7. *Duties of engineer; facts excusing injury.*—It being shown that the horse which was killed leaped on the track in such close proximity to the engine that it was impossible to stop or check the train in time to avoid the injury, this would not only authorize a verdict for the defendant, but would require it, "provided it was also shown that the engineer kept a proper look-out for stock, and could not have seen the horse, even by the exercise of the very great diligence exacted by his situation;" and in determining whether the engineer kept a proper look-out, "the jury must consider that other duties also devolve upon him, which may interfere, to some extent, with the constancy of uninterrupted observation."

8. *Negligence vel non; when question of law, and when of fact.*—The question of negligence *vel non* is a question of law for the decision of the court, "only when the case is so free from doubt that the inference of negligence to be drawn from the facts is clear and certain;" in all other cases, it is a question of fact for the determination of the jury.

9. *Same.*—Whether it is negligence for an engineer to run his train at a stated number of miles per hour, is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, &c.; and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident.

10. *Setting aside service of process.*—The issue of the summons and complaint, not the service of process, is the commencement of the action; and the setting aside of the service, on account of irregularities, does not abate or discontinue the suit.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. H. C. SPEAKE.

This action was brought by John W. Bayliss, to recover damages for the killing of a horse by the alleged negligence of the

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

defendant's servants, and was commenced on the 10th December, 1881. In the original summons and complaint the defendant was described as "the Memphis & Charleston Railroad Company (East Tenn., Virginia & Georgia Railroad Company, lessee), corporation owned and operated in the State of Alabama, under act of legislature of said State;" and the plaintiff's attorney having made affidavit that the president (or other head), secretary, cashier, or managing agent of the defendant corporation, was unknown to him, the summons was returned executed, December 13th, 1881, "by leaving copy of the within summons and complaint with W. V. Chardavoyne, R. R. agent, defendant." At the ensuing April term, 1882, as the judgment-entry recites, "came the Memphis & Charleston Railroad Company, by attorney, and moves the court to set aside *the process* in this case, because of misnomer of party defendant, and for other reasons in said motion stated;" and this motion being sustained by the court, it was further ordered, on motion of the plaintiff, "that plaintiff have leave to amend his summons and complaint, by striking out the words, '*East Tenn., Virginia & Georgia Railroad Company, lessee,*' where they occur in said summons and complaint; and that plaintiff have leave to amend his complaint, by making the East Tennessee, Virginia & Georgia Railroad Company party defendant; and that an *alias* summons and complaint issue, to be served on said Memphis & Charleston Railroad Company, and also on said East Tennessee, Virginia & Georgia Railroad Company." An *alias* summons and complaint was thereupon issued, which was returned executed, September 1st, 1882, "by leaving copy with W. V. Chardavoyne, depot-agent, for E. T., Va. & Ga. R. R. Co., defendant;" also, September 7th, 1882, "by leaving copy with James White, agent M. & C. R. R., defendant;" and November 11th, 1882, executed "on Memphis & Charleston Railroad Company, by leaving copy with S. R. Cruse, treasurer of said corporation." Each of the corporations appeared, by attorney, and separately pleaded, "in short by consent," 1st, not guilty; 2d, that the plaintiff's claim was not presented in writing, within six months after it accrued, to the president, treasurer, superintendent, or any depot-agent of this defendant, nor was suit brought thereon within said term of six months; 3d, the statute of limitations of one year; 4th, a special plea averring the lease of the Memphis & Charleston road to the East Tennessee, Virginia & Georgia corporation, and the exclusive liability of said latter corporation for all damages at the time of the alleged injury. Issue seems to have been joined on all of these pleas. Before entering on the trial, the East Tenn., Virginia & Georgia corporation moved the court to set aside the service of process on W. V. Chardavoyne, as depot-agent for

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

said corporation, "because said service of process upon him was without an affidavit being made as required by law;" and an exception was duly reserved to the overruling of this motion.

The evidence adduced on the trial, all of which is set out in the bill of exceptions, showed that the plaintiff's horse was killed on the morning of the 16th October, 1881, a few minutes before daybreak, by a train which was moving, as the engineer in charge testified, at the rate of thirty-five or forty miles per hour, being about twenty minutes late; and the place was about three-quarters of a mile distant from Town Creek station, which the train was approaching. At that place, and for some distance beyond, there was a fence on each side of the railroad; that on the north side being about thirty feet from the railroad track, and that on the south having a gap in it at the place where the horse was killed. Several witnesses for the plaintiff, who saw the horse and walked over the ground about an hour after the accident, testified from an examination of the horse's tracks, on the north side of the road, that he must have run along the path, parallel with the railroad, from 150 to 175 yards, and been killed just as he jumped on the track, opposite the gap in the fence on the south side; and one of the witnesses stated that, judging from his stride, he must have been running at the rate of a mile in five minutes. The plaintiff's witnesses testified, that the road was level, and the track straight, for about a mile from the place where the horse was killed; while other witnesses stated that there was a down grade on the road at that place, the track running on an embankment, about three feet high, which was succeeded by a shallow ditch near the gap in the fence. The engineer in charge of the train, who was examined as a witness for the defendant, testified, "that he never saw the horse until he sprung on the track about ten feet in front of the engine; that he immediately reached up his hand to sound the cattle alarm, but struck the horse before he could do so; that his head-light was in good order, burning brightly, and was as good as any head-light in use on any railroad; that by it, at that time of night, he was not able to discover an object ahead of him on the track more than one hundred yards; that the head-light, by reason of its focus, enables an engineer to see objects on the track some distance, better than objects near at hand, or on the side of the track; that the equipments and appliances of the engine and train were of the best description, and in perfect order; that he was himself at his post, in the vigilant discharge of his duties, and keeping a sharp look-out ahead, and he did not see any obstacle, or any object anywhere, until the horse jumped suddenly on the track, as stated; that the train was then running at from thirty-five to forty miles an hour, which was not

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

faster than regular schedule time; that the horse, when he jumped on the track, was so near him that it was impossible to stop the train, to reverse the engine, to sound the cattle alarm, ring the bell, or do any thing else before the animal was struck; that it takes seven or eight seconds to get an engine reversed, and that the train, at the rate it was then running, could not have been stopped by any human agency under 250 yards." This was the substance of the evidence adduced on these points.

As to the value of the horse, two of the plaintiff's witnesses testified that he "was worth \$300, or over;" another, that he was worth \$250; while it appeared that two appraisers, selected by the plaintiff, had valued him at \$200. As to this valuation, or appraisement, the plaintiff himself thus testified as a witness in his own behalf: "Witness obtained from Mr. Hartly, section foreman of the railroad, a blank form of voucher for making the usual valuation of stock killed, and selected Mr. Jolly and Mr. Lemay, as two disinterested persons, to value the horse. Witness understood said Hartly to tell him, at the time said voucher was furnished, that he should get the horse valued at the lowest reasonable cash valuation, and he would be paid that in cash without deduction. Said appraisers valued the horse at \$200." "Witness was then asked this question: 'State why the horse was valued at \$200 by the appraisers;'" and answered, "that it was because he told them not to value it at above \$200; that he had written to Mr. White about his horse having been killed, and had received no reply, but, from his conversation with said Hartly, he understood that the appraiser's valuation would be paid in cash without deduction, provided it was the lowest reasonable cash valuation, and therefore did not wish them to exceed \$200 in their valuation." To this question and answer, each, the defendant objected, "because it was irrelevant and incompetent evidence, and because it sought to elicit hearsay proof;" and duly excepted to the overruling of said objections. One of the appraisers, who was examined as a witness for the plaintiff, and who testified that the horse was worth \$250, though he had signed the appraisement at \$200, "was asked by plaintiff to state the reason why he appraised the horse at \$200;" and answered, "that it was because plaintiff asked them to place the valuation at the lowest cash value, not to exceed \$200, as he expected to be paid cash for it without deduction." The defendant objected to this question, "because it sought to elicit irrelevant evidence, and evidence calculated to mislead the jury;" and to the answer, "because it was irrelevant evidence, included the *ex-parte* statements of the plaintiff himself, and was calculated to mislead the jury;" and exceptions were reserved to the overruling of these objections.

The court charged the jury, in writing, as follows: "The

VOL. LXXIV.

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

first question to be determined is, whether the facts entitle the plaintiff to recover against either of the defendants. Under the provisions of the statute, when the plaintiff proves that his horse was killed by the train of the defendants, and that the killing was done in Lawrence county, and also the value of the horse, he has made out a *prima facie* case; and if the proof stopped there, the plaintiff is entitled to recover, provided he also proves that he has presented his claim to the defendant, or brought suit thereon, within six months after the killing. When the plaintiff has proved the above facts, then the burden of proof is shifted, and it devolves on the defendant to show that it is not liable for the damages resulting from the killing of the horse: *it then devolves on the defendant to show by its proof that it, through its agents and employees, has complied with the provisions of the statute, and has been guilty of no negligence.* . . . Under the statute, it is the duty of the engineer, on perceiving any obstruction on the track, to use all means in his power known to skillful engineers, such as the application of brakes, the reversal of his engine, &c., in order to stop the train; and if you believe that the engineer in charge of this train, on perceiving the horse on the track, failed to use all the means in his power known to skillful engineers in order to stop the train, and that the killing of the horse resulted from such failure on the part of the engineer, then the plaintiff is entitled to recover. But, if you believe, on the contrary, that the killing would have resulted, even though the engineer had used all the means in his power known to skillful engineers, in order to stop his train, then your verdict should be for the defendant, unless you find that the engineer was guilty of some other negligence than that above defined as statutory. *But the plaintiff says, that the defendant, through its engineer, was guilty of negligence in not seeing the horse before he got on the track; that he was running the train faster than schedule time.* It is for the jury to determine whether or not that was negligence on the part of the engineer; and in order to do this, the jury must look to all the evidence in the case—the time of night when the accident occurred; the head-light; the speed of the train at the time, whether faster than schedule time; the location of the railroad, with the fences contiguous thereto; the running of the horse parallel with the train and engine, together with all the other evidence; and if they find, from all the evidence, that the engineer in charge of the train did not exercise the care, watchfulness and skill, that a prudent and careful man would exercise in the management of his own affairs, then the defendant is guilty of negligence; and if they find that the killing was the result of such negligence, then their verdict should be for the plaintiff. *But, if the jury be-*

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

lieve, from the evidence, that the engineer used all the care and skill that a prudent man could or would have used in the management of his own affairs, then the defendant is not guilty of negligence, and their verdict must be for the defendant."

To the several italicized portions of this charge, each, the defendant duly excepted, "and also to so much of said charge as instructed the jury that, in determining the question of negligence *vel non*, they could look, among other things, '*to the speed of the train at the time—whether faster than schedule time.*'" The defendant then requested, in writing, the following (with other) charges, each of which was refused by the court, and exceptions duly reserved to the refusal of each.

"1. If the jury believe, from the evidence, that the engineer was at his post, and in the discharge of his duty, and was exercising that degree of diligence which very prudent persons observe in the conduct of their own business, then simply because he failed to see the horse, when running on the side of the track, does not make the defendant liable for the accident.

"2. If the jury believe, from the evidence, that when the horse went on the railroad track, the front of the engine was so near him that it was impossible for the engineer, before the engine struck the horse, to stop the train, or to sound the cattle alarm; then the jury would, upon this state of facts, be authorized to find for the defendant.

"3. If the jury find, from the evidence, that the accident occurred before day-light, and that the train was then moving at the rate of thirty-five miles an hour, and that the engine was so close to the horse, when he went on the track, that it was impossible to stop before striking him; then, upon this state of facts, the jury would be authorized to find for the defendant.

"4. The laws of the State do not require that either a railroad, or the lands of individuals, shall be so fenced about and inclosed that domestic animals, going at large, can not get upon them. Of course, though, the owners of such uninclosed property would be liable for damages resulting from any violence they should do to live stock straying thereupon, whether caused by acts willfully, or only negligently committed. But it does not follow that they must take upon themselves the care or protection of such wandering stock, or that they must, from fear of doing hurt thereto, refrain from using their own premises in any lawful manner beneficial to themselves. The owners of animals thus turned out, to go at large upon the premises of another, must bear the loss that must come to them from any mere accident not attributable to the positive misconduct or carelessness of another person. Therefore, if the jury believe, from the evidence in the case, that the plaintiff's horse was turned out, by those in charge of him, to run at large in a

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

field, and upon the uninclosed track of the railroad, and, whilst so running at large, strayed at or near said track, and got upon it, and was run over and killed by the cars of the railroad, the defendants would not be liable for such killing, if the jury should conclude, from all the evidence and circumstances of the case, that the killing was not the result of the positive misconduct or carelessness of the defendants, their agents, or servants.

"5. A railroad certainly has a right to the free and uninterrupted use and enjoyment of its road-bed; and this right is the same in character and degree that the owner of the freehold has to the exclusive use, enjoyment and occupation of his premises. Therefore, if the jury should find that the plaintiff's horse went upon the track of the railroad, where he was run over, or hit by the engine, and killed, and should conclude, from all the evidence in the cause, that the killing was not the result of the positive misconduct or carelessness of the defendants, their agents, or servants, then they would not be liable therefor, and the verdict of the jury should be for the defendants.

"6. If the jury find, from the evidence, that the plaintiff did not present his claim for damages, in writing, within six months from the day his horse was killed, to the president, treasurer, superintendent, or some depot-agent of the defendants, or either of them, the plaintiff cannot recover in this suit.

"7. The engineer was not, as matter of law, required to see the horse when he was running at the side of the track.

"8. If the jury find, from the evidence, that the engineer was running the train at the rate of thirty-five or forty miles an hour, they are not warranted in inferring that rate of speed was negligence of itself."

The jury returned a verdict in favor of the plaintiff, against the East Tennessee, Virginia and Georgia Railroad Company, and the court thereupon rendered judgment against said corporation, and that the other defendant go hence. The appeal is sued out by said railroad corporation, and all the rulings of the court to which exceptions were reserved, together with the judgment on the verdict, are now assigned as error, making thirty assignments in all.

HUMES, GORDON & SHEFFEY, for appellant.—(1.) The process was served upon a supposed agent of the defendant corporation, without the statutory affidavit required, in all actions against corporations, where the service is not made upon one of the designated officers.—Code, §§ 2934-35. (2.) The suit was commenced against one corporation, and judgment was rendered against another. When the original summons was set

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

aside and quashed, at the instance of the M. & C. Railroad Company, the suit was at an end, and there was nothing to amend by. The *alias* summons, as it is called, was the commencement of the suit against the E. T., V. & G. corporation, and was issued more than twelve months from the date of the injury. If it had been issued before the expiration of twelve months, no recovery could be had against said corporation, unless plaintiff had proved a presentment of his claim, in writing, within six months, as asserted in the 6th charge requested. (3.) The court erred in its various rulings on the evidence, allowing one of the appraisers to state their reason for valuing the horse at \$200, and permitting the plaintiff to testify to his own *ex-parte* statements to the appraisers.—*Whetstone v. Br. Bank of Montgomery*, 9 Ala. 875; *Clement v. Cureton*, 36 Ala. 120; *Oxford Iron Co. v. Spradley*, 51 Ala. 172; *Stringfellow v. Mariott*, 1 Ala. 573. (4.) The court erred, also, in its instructions to the jury as to the burden of proof on the question of negligence. The statute imposes upon the railroad company, when an injury has been shown, the burden of proving a compliance with all the statutory requisitions, and makes it responsible for all damages resulting from the non-compliance; but the instructions of the court go beyond this, and require the defendant to acquit itself of negligence, as well as to show a compliance with the statutory regulations. The case of *M. & O. Railroad Co. v. Williams*, 53 Ala. 599, goes beyond the statute, and the charge of the court goes beyond that case. The statute is in derogation of common-law principles, and should not be extended by construction.—Sedgw. Stat. & Const. Law, 267, 2d ed.; 8 Md. 25; 46 Me. 377; 1 H. & J. 567; 4 Mass. 534; 43 Ala. 605. (5.) There was no conflict in the evidence, and no circumstance was shown from which the inference of negligence could be drawn. The engineer testified that the train was running at the rate of thirty-five or forty miles per hour, and that this was not faster than schedule time; and this was the only evidence on that point. On this evidence, the question of negligence *vel non* did not arise, and it ought not to have been submitted to the jury.

W. P. CHITWOOD, and JAS. C. KUMPE, *contra*.—(1.) In such an action as this, service of process upon a depot-agent is authorized by the express words of the statute.—Code, § 1714. (2.) The value of the horse was a proper subject of inquiry; and one of the appraisers having stated, without objection, that he was worth \$250, and that they had appraised him at only \$200, it was competent to explain these inconsistent statements by proof of any facts connected with the appraisement. If the questions to plaintiff were not proper when asked, they

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

became so after Jolley was examined.—*McCoy v. Watson*, 51 Ala. 466; 1 Brick. Digest, 809, § 86. (3.) The issue of the original summons was the commencement of the action, although the service was quashed; and there was evidence showing a presentation in writing, within six months, to White, defendant's agent.—*Railroad Co. v. Brown*, 53 Ala. 651; *Railroad Co. v. Hagood*, 53 Ala. 647; *Railroad Co. v. Morris*, 65 Ala. 193; *Huss v. Central R. R. Co.*, 66 Ala. 473. (4.) As to the burden of proof, the charge of the court is sustained by *M. & O. Railroad Co. v. Williams*, 53 Ala. 595; and *S. & N. Railroad Co. v. Williams*, 65 Ala. 74. (5.) The question of negligence *vel non* was properly submitted to the jury.—*M. & C. Railroad Co. v. Lyon*, 62 Ala. 71; *Ala. Gr. So. Railroad Co. v. Jones*, 71 Ala. 487.

SOMERVILLE, J.—In the case of the *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595, the question as to the burden of proof, in suits for injuries to stock by the cars and locomotives of railroad companies, is fully discussed; and the rule is announced, that when the fact of the injury by the company, or its servants, is proved by the plaintiff, a *prima facie* case exists, and the burden of proof is then on the railroad company, which is sued as defendant, “to acquit itself of negligence, or to show a compliance with the statute.” If the injury occurs at the places, and under the circumstances detailed in section 1699 of the Code, then it will be sufficient to show a compliance with the requirements of the statute. If under other circumstances than these, the evidence must be sufficient to satisfy the mind of an unprejudiced jury that the injury occurred without such negligence as would render the defendant liable under the general rules of law governing the doctrine of negligence.

Whatever doubts may be entertained as to the strict soundness of the construction placed upon sections 1399 and 1401 of the Revised Code of 1867, by the opinion of the court in that case, we are unwilling to disturb its authority, for the reason, that the sections construed have since been re-adopted by the General Assembly into the present Code of 1876, and this was an adoption of the judicial construction previously placed upon them.—Code, 1876, §§ 1698–1700; *Ex parte Matthews*, 52 Ala. 51. The case has, moreover, been several times followed in subsequent decisions of this court.—*S. & N. R. R. Co. v. Thompson*, 65 Ala. 74.

There was no error in the charge of the Circuit Court in reference to the burden of proof, which is admitted to be in accordance with the rule above stated.

The fact that the plaintiff had valued his horse, claimed to

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

have been killed, at only two hundred dollars, or suffered it to be so valued by the appraisers whom he selected and procured to certify to the correctness of his claim, was an admission on his part as to the just value of the animal. This could be rebutted by any fact tending to show that this valuation was not based upon the real and true opinion of the persons selected to make the appraisement. It was a part of the *res gestæ*—the act of appraisement itself—that the seemingly low valuation was induced by the plaintiff's own persuasion; and hence the testimony of the several witnesses on this point was unobjectionable, whatever objection there may have been to the form of the question by which it was elicited. Where a question is obnoxious to objection, which is duly interposed, and the witness makes an answer to it not strictly responsive, but apparently suggested by it, the objection to the question does not cover the independent matter thus elicited.—*Barnes v. Ingalls*, 39 Ala. 193. It is only where the answer itself is irrelevant or illegal evidence, and is called for by the question propounded, that no separate objection to the answer is required.—*Gilmer v. City Council*, 26 Ala. 665.

The motion to set aside the service of the summons and complaint, for the want of a proper affidavit, was properly overruled. Where a suit is brought against a railroad company for *injury to stock* cognizable in a Circuit Court, process may be executed on any one of the officers or agents designated in section 1714 of the Code, among whom is expressly included "a depot-agent;" and for this purpose no affidavit is required.—Code, 1876, § 1714. It is only in suits of another nature, other than for injuries to stock, that the affidavit required by section 2935 of the Code is required to be made, and then only where the road sued is a corporation.

A claim for damages to stock injured or killed by a railroad train is barred, under the statute, "unless *complaint is made* within *six months* from the date of such killing or injury."—Code, 1876, § 1711. This may be done by presenting the claim, in writing, to "the president, treasurer, superintendent, or some depot-agent of the railroad company" (*Ala. Gr. Southern R. R. Co. v. Killian*, 69 Ala. 277; Code, § 1701); or by bringing suit against the railroad company within the required time.—*S. & N. Ala. R. R. Co. v. Morris*, 65 Ala. 193. So, if the company appoints a special agent for the purpose of reporting such claims, and the claim is preferred to such agent, and he reports it in writing to the company within six months, this has been adjudged sufficient.—*S. & N. Ala. R. R. Co. v. Brown*, 53 Ala. 651.

It is true that the present suit was not commenced against the appellant within six months from the date of the injury

[E. T., Va. & Ga. R. R. Co. v. Bayliss.]

sued for; but there was evidence tending to show that the claim was presented to the depot-agent of the defendant, and also to their authorized agent, White, who was appointed to look after such claims. The *sixth* charge requested by the defendant was properly refused, because it entirely ignored the alleged presentation to White, and his probable transmission of it to the company, and also withdrew from the jury, as a question of fact, whether the space of six months had elapsed from the time of the injury to the date of bringing the suit.

If the testimony of the engineer was true, to the effect that, when the horse leaped on the track, he was in such close proximity to the engine that it was impossible to arrest the progress of the train so as to prevent the injury, this state of facts would not only *authorize* the jury, but would render it their *duty*, to find a verdict for the defendant, *provided* that the engineer had kept a proper lookout for stock, and could not have seen the horse, even by the exercise of the very great diligence exacted by his situation. We have often announced the rule, that the law demands of railroads and their servants that degree of care which very prudent persons take of their own affairs, and that infallibility is not required.—*Cook v. The Central Railroad*, &c. 67 Ala. 533, and cases cited. In determining whether the engineer was guilty of negligence in looking out for probable obstructions on the track, the jury must consider that other duties also devolve upon him, which may interfere, to some extent, with the constancy of uninterrupted observation.

In all cases not free from doubt, either where the evidence is conflicting, or where it is not, and different minds may reasonably draw different inferences or conclusions on the subject, the question of negligence is one of fact for the determination of the jury. It becomes a question of law, to be decided by the court, only when the case is so free from doubt as that the inference of negligence to be drawn from the facts is clear and certain.—*The City Council of Montgomery v. Wright*, 72 Ala. 411; Whart. on Negl. § 420; *Lanier v. Youngblood*, at present term.

In view of these principles, the *first* and *seventh* charges requested by the appellant were erroneous, in submitting to the determination of the court, as matter of law, the question of the engineer's negligence *vol non*, based upon his alleged failure to keep a proper lookout; and the *second* and *third* charges were also objectionable, in withdrawing the consideration of this question entirely from the jury. These charges were, therefore, properly refused.

Whether it be negligence for an engineer to run his train at a certain rate, or number of miles per hour, can not be said

[Farris & McCurdy v. Houston.]

always to be a question for the court to determine. It is most generally a mixed question of law and fact, dependent upon many controlling circumstances, including the condition and structure of the road, the relative straitness of the road-bed, or declivity of the grading, the character and capacity of the brakes in use, and other circumstances of like kind. There is no proof as to these various conditions in the present case, and we are not able to say that it was, or was not, *per se* negligence for the engineer to have been running his train at the rate of from thirty-five to forty miles per hour, at the time of the accident in controversy. This question was properly left to the jury, and the several charges requested by defendants were erroneous, which sought to devolve its determination upon the court as a pure matter of law.

We are unable to see upon what ground the *fourth* and *fifth* written charges requested by the defendants were refused to be given. The killing of plaintiff's stock must have been attributable either to positive misconduct, in the nature of a willful or intentional act on defendant's part, or else to carelessness, or to inevitable accident. If it was not the result of either of the two first causes, it certainly was of the last, and was, therefore, in such event excusable. The refusal of these charges was error, the preliminary portions of them being unobjectionable.—*M. & O. R. R. Co. v. Williams*, 53 Ala. 595, 597.

The effect of quashing the *service* of the summons and complaint upon the Memphis & Charleston Railroad Company did not, as contended by appellant's counsel, operate to discontinue or abate the suit. The issue of the summons and complaint was the commencement of the suit, and its pendency was totally unaffected by the act of the court in setting aside the service for irregularity.—*Cotton v. Huey*, 4 Ala. 56; *Maverick v. Duffie*, 1 Ala. 433. The only effect was to necessitate the issue and service of an *alias* process.

Reversed and remanded.

Farris & McCurdy v. Houston.

Special Action for Rent as Damages.

1. *Estoppel as between landlord and tenant.*—As a general rule, when a tenant is sued for rent, or for the possession on the expiration of his term, he can not dispute the title of his landlord, nor set up a paramount title in himself or a third person; but he may show that the landlord's title has expired by limitation, or by operation of law; or that he ac-

[Farris & McCurdy v. Houston.]

cepted a lease, or attorned to the plaintiff as landlord, under a mistake of fact, and in ignorance that the title was in himself; or that he was induced to attorn, or to accept a lease, through fraud, imposition, or undue advantage; or that he has been evicted by title paramount.

2. *Legal rights of mortgagee.*—Under the repeated decisions of this court, a mortgage is something more than a mere security for a debt: it vests in the mortgagee an immediate estate in the lands conveyed, and gives him a right to enter at once, in the absence of an express stipulation to the contrary; and after the law-day, default being made in the payment of the secured debt, his estate becomes absolute at law, nothing remaining in the mortgagor but the equity of redemption, of which courts of law take no notice.

3. *Payment of rent to mortgagee; rents and profits, as between mortgagor and mortgagee.*—The payment of rent to a mortgagee who is in possession, or to whom the tenant has attorned to avoid eviction, extinguishes the rent, and releases the tenant from liability to the mortgagee, under whom he entered; and while a court of equity will, under a bill to redeem by the mortgagor, apply rents and profits received by the mortgagee to the payment and discharge, *pro tanto*, of the mortgage debt, the law makes no such application of them, and no inquiry is allowed, at law, into the payment or extinguishment of the mortgage debt, in order to defeat the legal estate or title of the mortgagee.

4. *Estoppel between mortgagor and mortgagee, and their privies in estate.*—A tenant who has entered under the mortgagee, or under an assignee of the mortgagee, can not defeat a recovery by his landlord, by showing the subsequent grant of letters of administration to himself on the estate of the deceased mortgagor, and the insolvency of the estate, and claiming an extinguishment of the mortgage debt by the rents and profits received.

APPEAL from the Circuit Court of Montgomery.

Tried before HON. JOHN P. HUBBARD.

This action was brought by Mrs. Mary J. Houston, against T. L. Farris and W. D. McCurdy as partners, and was commenced on the 14th November, 1881. The complaint contained five counts, the third and fourth of which claimed damages for the breach of a written agreement, by which defendants bound themselves to erect certain improvements on lands rented to them by the plaintiff; and no recovery was claimed under them. The first count claimed \$3,000 as damages, for that whereas, on the 18th December, 1879, plaintiff leased to defendants for the term of one year, commencing on the 1st January, 1880, a certain plantation in Lowndes county, at the agreed rent of eighteen bales of cotton, of the average weight of 500 lbs., and \$300 to be expended in specified improvements, and put them in possession of said lands on said 1st January, 1880; said defendants continued in possession during the term of their said lease, and unlawfully retained the possession after the expiration of the lease, up to the commencement of the suit, and failed and refused to pay any part of the rent; whereby plaintiff has been damaged to double the amount of the rent agreed to be paid, to-wit, \$2,400. The second count averred the lease, entry, and unlawful holding

[Farris & McCurdy v. Houston.]

over, as in the first count, and claimed \$2,000 as special damages, because plaintiff was prevented, by such unlawful detainer, from renting or leasing the lands for the year 1881. The fifth count claimed \$1,200, with interest, "the rent of the tract of land described in the first count of this complaint, which is hereby referred to and adopted as a part of this count; which said land was demised by plaintiff to said defendants, on the — day of —, 1879; said rent commencing on the 1st January, 1880, and falling due October 15th, 1880, and being for the year 1880." The record does not show what pleas were filed. There was a judgment, on verdict, for the plaintiff, for \$2,308.16; and it was admitted by a written agreement, entered of record in this court, that this was "for the rent of said property for the years 1880 and 1881, and that the plaintiff, at the trial, released all damages claimed for the breach of the written agreement set out in the third count."

On the trial, as the bill of exceptions states, the facts were agreed on, and reduced to writing, as follows: "The following facts are admitted: Robert Simonton, of North Carolina, died about 1878, leaving a will, by which he devised and bequeathed all of his property absolutely to his wife, Roxana Simonton. He left no personal property in this State, but owned two plantations in Lowndes county, known respectively as the 'Simonton place' and the 'Davidson place.' Said Robert Simonton was indebted at the time of his death, and in November, 1880, the defendants, Farris & McCurdy, took out letters of administration on his estate in Lowndes county; his will having been admitted to probate in that county, and also in North Carolina. They took out said letters of administration, on the ground that they were creditors of said Simonton; but the only claims held by them were debts which they bought after renting the property from Mrs. Houston, the plaintiff, as hereinafter stated; and the administration was also assumed by them after such renting. Debts against said Simonton's estate, to the amount of about \$20,000, have been presented to said Farris & McCurdy as administrators, and the estate is insolvent in fact, and has been regularly declared insolvent since the commencement of this suit. No petition for the sale of said lands, rented by defendants as hereinafter stated, was filed by said Farris & McCurdy, as such administrators, before the commencement of this suit; but, in March, 1882, a petition was filed by them in the Probate Court of Lowndes county, for the sale of said lands, and an order of sale was made by said court, under which said lands were sold; and the sale was confirmed by said court. The petition under which this order was granted, and said sale made, contained proper jurisdictional averments, if the property belongs to said Simonton's estate. Said Farris & McCurdy

[Farris & McCurdy v. Houston.]

went into possession of said lands in January, 1880, as the tenants of the plaintiff, Mrs. Houston, for the term of one year; and while they were so in possession, they took out letters of administration on said Simonton's estate as aforesaid, and now claim the right to hold said property as such administrators. At the time of the renting to Farris & McCurdy, plaintiff held possession of the property, and title thereto, under a deed from Mrs. Roxana Simonton, made to plaintiff pursuant to an agreement between said plaintiff and said Simonton, in his life-time, and also under a mortgage executed by said Simonton to one Duncan McCall; which said mortgage was dated November 16th, 1869, and transferred to said plaintiff January 14th, 1879. The law-day of said mortgage was past at the time the property was so rented to Farris & McCurdy. The amount paid to plaintiff by said Farris & McCurdy, for the rent of the property for the year 1879, equaled the balance due on the mortgage debt. The title to the property held by plaintiff has continued, since said renting, the same that it was at the time of such renting, unless it was affected by the said grant of administration to Farris & McCurdy, and by said sale. It is admitted, also, that after the said term of renting had expired, and before this suit was begun, plaintiff made a written demand of possession of said property, and that defendants refused to surrender the possession when so demanded. All objections to the relevancy and legality of the above facts as evidence are reserved by both parties. It is admitted, also, that the following may be taken as the deposition of J. H. Houston, as witness for the plaintiff, namely: That the rent agreed to be paid by defendants to plaintiff, for the year 1880, was eighteen bales of cotton, of 500 lbs. each, and \$300 in improvements to be put on the lands by said defendants; that said rent was due October 15th, 1880, and has not been paid; that the value of said cotton was \$900, which, added to the value of the improvements to be erected, makes the amount of rent due October 15, 1880, \$1,200; and that the reasonable value of the rent of said property for the year 1881, due the 15th October, 1881, is \$1,200. It is admitted, also, that the plaintiff instituted an action of unlawful detainer against said defendants, to recover the possession of said property, the said defendants having held over after the expiration of their term as aforesaid; and that judgment was rendered in said cause in favor of the plaintiff, by the Circuit Court of Montgomery county, on the 13th June, 1883, which judgment is still of full force and effect."

"This was all the evidence in the cause; and the court thereupon charged the jury, on the request in writing of the plaintiff, that they must find for the plaintiff, if they believed the

[Farris & McCurdy v. Houston.]

evidence." The defendants duly excepted to this charge, and they now assign it as error.

CLOPTON, HERBERT & CHAMBERS, for appellants.—When the plaintiff received the rent for the year 1879, which was sufficient to satisfy the mortgage debt, her right to receive rent as mortgagee ceased; and when she rented the lands to the defendants for the year 1880, her only title and right to the lands, and to the rents, rested upon the conveyance from Mrs. Simonton, the devisee of Robert Simonton. The title of the devisee, as of the heir when there is no will, gives him the right to take possession, and to claim the after-accruing rents; but this title is subject and subordinate to the statutory powers conferred on the personal representative, who may take possession, and claim rents from the tenant, past due or accruing.—*Masterson v. Girard's Heirs*, 10 Ala. 60; *Br. Bank v. Fry*, 23 Ala. 770; *Chighizola v. LeBaron*, 21 Ala. 406; *Harkins v. Pope*, 10 Ala. 493; *Calhoun v. Fletcher*, 63 Ala. 580; *Nelson v. Murfree*, 69 Ala. 603. The statute not only clothes the administrator with the power to claim the rents, but makes it his duty to do so; and he is liable to creditors, if he fails to exercise the power, and the rents are thereby lost.—*Clark v. Knox*, 70 Ala. 607, 622. When the defendants became the administrators of Simonton's estate, and it became necessary to exercise their statutory powers for the benefit of creditors, they might have intercepted these rents, in the hands of another tenant; and being themselves the tenants, they not only had the right to retain, but were required to do so, and the new obligation which the law imposed upon them discharged their former obligation to the landlord. The strict rule of the common law, as to estoppels between landlord and tenant, has been modified by modern decisions; and the tenant is now held estopped from denying that the landlord, *at the time of making the lease*, had the right to demise, and can not acquire, during the tenancy, a title adverse to the landlord which was outstanding at that time. If the title of the landlord, or his claim to the rents, remains unchanged, the tenant can not dispute the liability to pay rent; but he may show that the title of the landlord has terminated, either by its own limitation, or by grant, or by judgment and operation of law.—*Randolph v. Carlton*, 8 Ala. 614; *Hoag v. Hoag*, 35 N. Y. 469; *Pope v. Harkins*, 16 Ala. 321; 9 Ill. App. 83; *Taylor's Land. & Tenant*, § 707; *English v. Key*, 39 Ala. 117. These decisions rest upon the principle, that when the tenant has been placed in a new relation, and under a new obligation, whether by the voluntary act of the landlord, or by operation of law, he is necessarily discharged from the obligations which attached to the former relation; and this

[Farris & McCurdy v. Houston.]

principle applies to this case. Upon the principle decided in *Clarke v. Clarke* (51 Ala. 496), the tenant of a devisee is estopped from denying the right and title of the deviser's legal representative. In purchasing claims against Simonton's estate, to the payment of which the lands were subject, and procuring the grant of administration to themselves, the defendants committed no act of disloyalty to their landlord, any more than by purchase of the lands at sale under execution against him, as they may do.—*Randolph v. Carlton*, 8 Ala. 614.

BRAGG & THORINGTON, and J. W. BUSH, *contra*.—In a former case between these parties, decided at the last term, it was held that the facts set up in defense of this action, were not available to defeat a recovery by the plaintiff in action of unlawful detainer.—*Houston v. Farris & McCurdy*, 71 Ala. 570. That judgment is conclusive as to the right to recover rents in this action.—*Norwood v. Kirby's Adm'r*, 70 Ala. 397. Moreover, the facts set up in defense do not bring the case within any recognized exception to the general doctrine of estoppel, as applied between landlord and tenant.—*Rogers v. Boynton*, 57 Ala. 501; *Crawford v. Jones*, 54 Ala. 459; *Borland v. Box*, 62 Ala. 91; *Otis v. McMillan*, 70 Ala. 47; *Taylor's Land. & Tenant*, § 629. If the defendants suffer injury from the antagonistic relations in which they have placed themselves, it is the consequence of their own disloyal acts, and they can not complain of it. But the deed to plaintiff was made, as the agreed facts show, pursuant to an agreement between her and Simonton in his lifetime; and this agreement being valid, and founded on valuable consideration, as the court must presume, the lands could not be subjected to the payment of debts by the administrators. In addition to the deed, the legal title to the lands was also vested in plaintiff as mortgagee; and though the rents collected may have been sufficient to discharge the mortgage debt, the mortgage was not thereby extinguished, nor the legal title of the mortgagee divested.—*Slaughter v. Doe*, 67 Ala. 494; *Jackson v. Scott*, 67 Ala. 99.

BRICKELL, C. J.—The rule is well settled, and is not questioned, that a tenant can not dispute the title of his landlord, nor set up a paramount title in himself, or in a stranger, to defeat any action the landlord may institute for the recovery of rent, or, when the term has expired, to regain possession of the premises. There are various exceptions to, and qualifications of the rule, which are of as much importance as the rule itself, and which must be observed in the administration of justice between landlord and tenant. A plain mistake of facts constitutes one of the exceptions. The tenant may show that he at-

[Farris & McCurdy v. Houston.]

torned to the landlord, or accepted a lease from him, under mistake, and in ignorance of the true state of the title, and that the title was in himself, or out of the lessor.—2 Greenl. Ev. § 305; 2 Smith's Lead. Cases, 752; Taylor on Land. & Tenant, §§ 707–8. Fraud, or imposition, or undue advantage, the same authorities show, is another exception to the rule: whenever, by the fraud, or misrepresentation of the lessor, the lessee is induced to accept the lease, he may impeach the title of the lessor.

The estoppel operates only to preclude the tenant from disputing the title of the landlord at the time when the lease was made, and possession given; but not from showing that the title which the landlord then had was defeasible, or limited in its nature, and has since been defeated, or has expired by its own limitation.—2 Smith's Lead. Cases, 752. Hence, evidence that the landlord has assigned the reversion, and that the tenant has attorned to the assignee; or that, under a judgment and execution, the reversion has been bought in by the tenant, or by a third person, to whom he subsequently attorns to avoid eviction, will make a good defense to an action by the landlord for the recovery of rent, or of possession.—*Randolph v. Carlton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321; *English v. Key*, 39 Ala. 131; *Otis v. McMillan*, 70 Ala. 46. In these cases, the tenant does not dispute the title of the landlord—does not deny that, at the time of the demise, he had the right to make it; but avers that the title then existing has expired. In *Randolph v. Carlton*, *supra*, the court said: "By receiving possession from another under a lease, the tenant impliedly admits that the lessor had such title as authorizes him to dispose of the premises; but he can not be held to affirm any thing in respect to its continuance; consequently, it is allowable for him to show that the title has expired, or been extinguished by operation of law."

The point of contention in this case is, whether the title of the lessor, existing at the time of the lease under which the lessees entered into possession, has expired, or been extinguished. We do not deem it necessary to inquire, whether, if the title of the lessor was derived wholly from the conveyance of the lands to her by the devisee, Mrs. Simonton, the tenants having assumed the relation of administrators of the testator, subsequently to the lease, and in that relation having the legal right to the possession, and to intercept the rents and profits, would be heard to gainsay the title of the lessor. It may be true, as was said upon this point, in another case between these parties, that "their legal metamorphosis, from mere *tenants* to *administrators*, was their own act, and renders none the less necessary the surrender of their possession to the plaintiff, be-

[Farris & McCurdy v. Houston.]

fore they can, in good faith, raise the question as to the superiority of their newly acquired title.”—*Houston v. Farris & McCurdy*, 71 Ala. 573. It was not only under the conveyance from the devisee, but under a mortgage executed by the testator, the law-day of which had passed, that the lessor had and claimed possession, when the lease was made and the tenants entered.

Whatever may be the theory of a mortgage of lands elsewhere recognized, it is settled in this State, by a line of decisions which have become essential to the safety of titles, that it is more than a security for a debt, or a mere chattel interest. “It creates a direct, immediate estate in lands; as against the mortgagor, and those claiming in his right, *a fee simple, unless otherwise expressly limited*. The estate is conditional—annexed to the fee is a condition which may defeat it. The mortgagee, if in the conveyance there is not a reservation of possession to the mortgagor, until default in the performance of the condition, has the immediate right of entry, and may eject the mortgagor or his tenants. If the mortgagor is permitted to remain in possession, he is the mere tenant at will of the mortgagee. After the law-day, and default in the performance of the condition, at law, the estate is absolutely vested in the mortgagee—the estate is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which courts of law take no notice.”—*Welsh v. Phillips*, 54 Ala. 314; *Paulling v. Barron*, 32 Ala. 11; *Barker v. Bell*, 37 Ala. 358; *Slaughter v. Swift*, 67 Ala. 494; *Toomer v. Randolph*, 60 Ala. 356. The payment of rent to a mortgagee who is in possession, or to whom the tenant has attorned to avoid eviction, is an extinguishment of the rent, relieving the tenant from liability to the mortgagor, though under him the tenant may have entered originally.—1 Smith’s Lead. Cases, 938.

The rents and profits a mortgagee in possession may receive, a court of equity will apply, when the mortgagor claims redemption, to the payment of the mortgage debt. The law does not make the application; for, at law, the rents and profits accrue to the mortgagee, as the owner of the legal estate. It is only in equity the application is made, and then, as an equitable set-off, and as an incident to the right of redemption. *Toomer v. Randolph*, 60 Ala. 358. At law, there can be no inquiry, to defeat the legal estate of the mortgagee, into the existence, or payment, or extinguishment of the mortgage debt.—*Slaughter v. Swift*, 67 Ala. 494.

The title of the lessor, derived from the mortgage, in the contemplation of a court of law, has not expired, or been extinguished. It remains, as it existed when the tenants accepted the lease, and entered into possession, thereby admitting its validity, and its sufficiency to support the demise. If, as ad-

[Mobile Life Insurance Co. v. Randall.]

ministrators of the mortgagor, the tenants have now the equity of redemption, and a right to compel the application of the rents to the payment of the mortgage debt, a court of equity alone can relieve them. In a court of law, there is no foundation for the claim, that the title of the lessor has expired, or been extinguished; and, of consequence, no right of resistance to her recovery of rent. As administrators, it is only the title or estate of the mortgagor which they can, in any court, assert. An estoppel of the same nature as that binding upon a tenant, precludes a mortgagor, or those claiming under and in privity with him, from disputing the title of the mortgagee, or his right to the possession, so far as the right is not inconsistent with the terms of the mortgage.—1 Jones Mort. § 682.

We find no error in the record, and the judgment must be affirmed.

Mobile Life Insurance Co. v. Randall.

Special Action on the Case for Damages.

1. *Complaint; what counts may be joined.*—Counts in trover and in case may be joined in the same complaint, but counts in trover can not be joined with counts in assumpsit.

2. *Amendment of complaint.*—The introduction of a new cause of action, by an amended count, is a departure from the original complaint, and is not allowable.

3. *When case lies, and when assumpsit.*—For the breach of an ordinary contract, which involves no element of tort, an action of assumpsit is the proper remedy, and an action on the case will not lie; but, when a duty is imposed by the contract, or grows out of it by legal implication, and injury results from the violation or disregard of that duty, an action on the case will lie to recover damages, although an action of assumpsit might also be maintained for the breach of duty.

4. *Same.*—Whenever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, the party injured may maintain an action on the case; and if the transaction had its origin in a contract between the parties, the contract is mere matter of inducement.

5. *Count held not to be in case.*—A count by which plaintiff claims damages, for that whereas, on the — day of —, plaintiff and defendant entered into an agreement, whereby plaintiff became agent of defendant, a corporation engaged in the business of life-insurance, and, under said agreement, was to solicit and procure the taking out of policies in defendant's said company, and was to receive, as compensation for his said services, certain commissions upon the premiums on said policies, and commissions upon renewal premiums; and then avers, "that plaintiff engaged actively in said business, giving his time, energies and attention to the business, and expending large sums of money in building up and

[Mobile Life Insurance Co. v. Randall.]

extending defendant's business; that said contract was renewed from time to time, until, to-wit, on the 3d day of April, 1876, said contract was so modified as to give or entitle plaintiff to a life interest of ten per-cent. in all renewal premiums upon all ordinary life policies then in force, procured by him, or issued through his agency, or which should be thereafter procured through his agency, and a life interest of twenty per-cent. on all yearly renewal term policies; that a large majority of the policies issued by defendant during plaintiff's connection with said company, to-wit, &c., "were issued upon applications sent in through plaintiff's agency, and were in force; and that defendant, disregarding the rights of plaintiff under said agreement, and in violation of said agreement, did, to-wit, on the 1st day of September, 1878, wrongfully discharge plaintiff from its service, and deny him all right to said renewal premiums, or any interest therein, and still refuses to recognize his interest therein," —is in assumpsit, and not in case.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. LEROY F. BOX.

This action was brought by R. O. Randall, against the appellant, a domestic corporation, and was commenced on the 5th April, 1879. The original complaint contained two counts, each in trover; and a third count was added by amendment, which was in these words: "Plaintiff claims of defendant, also, ten thousand dollars as damages, for that whereas, to-wit, on the—day of—, plaintiff and defendant entered into an agreement, whereby plaintiff became the agent of said defendant, a corporation engaged in the business of life-insurance in the State of Alabama, and, under said agreement, plaintiff was to solicit and procure the taking out of policies in defendant's company, and was to receive, as his compensation for his said services, certain commissions upon the premiums on said policies; and plaintiff engaged actively in the business, giving his time, energies and attention to the business, and expending large sums of money in building up and extending the defendant's said business; that the said contract was renewed from time to time, until, to-wit, on the 3d day of April, 1876, the said contract or agreement was so modified as to give or entitle plaintiff to a life interest of ten per-cent. in all renewal premiums upon all ordinary life policies then in force, procured by plaintiff, or issued through his agency, or which should be thereafter procured through his agency, and a life interest of twenty per-cent. on all yearly renewal term policies; that a large majority of the policies issued by defendant during plaintiff's connection with defendant, to-wit, 184 ordinary life policies, and 26 yearly renewable term policies, as described in the first count, were issued upon applications sent in through plaintiff's agency, and were in force. And plaintiff avers that defendant, disregarding the rights of plaintiff under said agreement, and in violation of said agreement, did, to-wit, on the 1st day of September, 1878, wrongfully discharge plaintiff from its

[Mobile Life Insurance Co. v. Randall.]

service, and deny him all right to said renewal premiums, or any interest therein, and still refuses to recognize plaintiff's interest therein; to plaintiff's damage, ten thousand dollars." The defendant demurred to the entire complaint, after this third count was filed; on the ground of a misjoinder of counts; and also to this count separately, because it was in assumpsit, and because it was a departure from the original complaint. The court overruled the demurrer to the entire complaint, holding that the third count was in case, and sustained a demurrer to the second count; and on the trial, as the bill of exceptions states, held the plaintiff's evidence inadmissible under the first count. The general issue was pleaded to the third count, after the overruling of the demurrer, and the cause was tried on issue joined on that plea.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence two contracts in writing, entered into between him and the defendant, and signed by both of them, which were in these words:

1. "This agreement, made this 19th day of February, 1874, to take effect and be in full force from and after said day, and to expire on the 19th day of February, 1875, between R. O. Randall, of Gadsden, Alabama, of the first part, and the Mobile Life Insurance Company, of Mobile, Alabama, of the second part, *witnesseth*, that the said party of the first part, for the consideration hereinafter mentioned, agrees to act as agent of the said party of the second part, in soliciting applications and collecting premiums for insurance, and such other duties as may be intrusted to or required of him in the prosecution of the business of said agency, under the conditions hereinafter mentioned. In consideration whereof, the said party of the second part hereby agrees to pay the said party of the first part, as full compensation for such service and work performed by him, or of sub-agents employed by him, with the additional expense of postage, expressage, exchange, medical examinations, legal taxes and legal advertising, a commission of thirty-five per-cent. on all policies, except ten payment-endowment and five payment policies, on which the commission shall be twenty-five per-cent. on the first premiums of policies issued and paid for on applications taken by him, except premiums on full policies (*i. e.*, for which the whole premium for life is paid at once), which shall be seven and a half per-cent., and ten per-cent. of the renewal premiums, as follows: on all policies, except ten payment-endowment and five payment policies, on which the renewal commission shall be seven and one half per-cent., and ten per-cent. of the renewals of policies now in force in said agency and collected by him, and for which collections he shall deliver receipts, furnished (signed) by the president or

[Mobile Life Insurance Co. v. Randall.]

secretary of the company, but will be entitled no longer to any renewal than the assured remains resident within said agency; but, for the collection of renewal premiums on a policy issued to a person not residing within the said agency when originally assured, the agent is entitled to commissions as in other like renewals. It is further understood and agreed, that the said party of the first part shall have the option of renewing this contract annually, on the same terms, for five years. It is also understood and agreed, that the said party of the second part reserves to *themselves* the right at any time to send travelling agents to said agency, to solicit applications, deliver policies, and collect premiums; and said agent agrees, in all such cases, to give such travelling agents his earnest co-operation and assistance, and to attend to all unfinished business of such travelling agents, in the delivery of policies and collection of premiums, for which service he will be remunerated in the future renewals of the policy. In cases of substituted policies, of increased insurance, on the same person, into a larger policy (the old policy being surrendered), or of increased premiums resulting from any other change of policy, when such change is procured by said agent, commissions will be allowed for the first year of the substituted policy, or increased premium, only upon the actual amount of the increase of premium received by the company. When the premium is payable either quarterly or semi-annually, commissions will be allowed only upon the sum so obtained, and in no case before the sum is collected and paid over to the company. In consideration of the above, the said party of the first part agrees to devote his whole time and attention diligently to the interests of the said party of the second part, to the said business of soliciting applications and collecting premiums within the limits of said agency, and to make a report to the home office in Mobile on the last business day of each month, with remittances to balance such report, and that the said party of the first part will not work for any other life-insurance company during this contract; and the failure to carry out this contract, in any of the above particulars, shall be good and sufficient reasons for the removal of such agent. And it is further understood and agreed, that upon the discontinuance of the service of said agent, either by resignation, removal, or any other way, all interest of said agent in this contract, in commissions, premiums, or renewals, shall cease, and shall revert to the company, unless it is otherwise specially agreed. In witness whereof," &c.

2. "It is hereby agreed, that the contract between R. O. Randall, of Gadsden, Alabama, of the first part, and the Mobile Life Insurance Company, of Mobile, Alabama, of the second part, shall, in consideration of the faithful and efficient

[Mobile Life Insurance Co. v. Randall.]

services of the party of the first part, be so changed as to allow the party of the first part ten (10) per-cent. commissions on single payments, or full paid policies, in lieu of seven and one half (7.5) per-cent., as stated in the contract, and also the policy fees on all the policies issued through his agency; and it is further agreed, that the said party of the first part shall be entitled to, and shall receive from the party of the second part, a commission of ten (10) per-cent. of the renewal premiums of all the policies now in force in said agency and on his books, and on all policies that may hereafter be issued through his agency, so long as the policies are kept in force, or during the remainder of the life of the party of the first part; provided that, whenever the said party of the first part shall, from any cause, cease to collect the renewal premiums on the policies as aforesaid, the party of the second part shall use due diligence in the collection of the same, and pay over to the said party of the first part, during each and every year, the ten (10) per-cent. commissions on the amount so collected, less the actual cost of collection, which shall in no case exceed five (5) per-cent. of the premiums; and it is further agreed, that the party of the first part shall receive a commission of twenty (20) per-cent. of the first and all subsequent premiums on the yearly renewable term policies (a plan of insurance not provided for in the original contract), and that the twenty (20) per-cent. commissions shall accrue to the party of the first part, during his life-time, subject to the same provisions as policies issued on other plans of insurance. Dated this 5th April, 1876."

These contracts were admitted in evidence by the court, as competent under the third count, and exceptions to their admission were reserved by the defendant. The plaintiff, testifying as a witness for himself, stated the services which he had performed as agent for the defendant, the number of policies which he had procured, the amount of annual premiums on renewals, &c., and the value of his interest therein by the terms of the second (or modified) contract; and he then continued: "I had collected the renewals on the 27th August, 1878, and ceased to collect the renewals on the 1st September. I had issued renewal notices for September, and was ready to collect the same; but renewal receipts were withheld from me by the defendant, and I could not collect the renewals without the receipts. It was the custom of the company to send out renewal receipts, signed by its secretary; and I could not collect the renewals without such receipts signed by the secretary." The witness further stated, on cross-examination, that he "joined the Knights of Honor in the spring of 1878, and organized lodges in the spring and summer, prior to 1st August;" that this society is "an association and species of life-

[Mobile Life Insurance Co. v. Randall.]

assurance—no one can join the association without taking life-insurance; and that he solicited parties who had policies in the defendant's company to join said association;" also, that he "became secretary of the People's Mutual Relief Association (a co-operative life-insurance company, on the assessment plan), at its organization, on the 1st August, 1878;" that he "ceased to solicit new business for the defendant, when he went into the Knights of Honor and the People's Mutual Relief Association, and ceased to work for the defendant, for or in general business, in June, 1878, and so notified the secretary." It further appeared from the letters between the parties, which were read in evidence, that the defendant regarded the plaintiff's engagement with these other companies, as a violation of the contract between them, and therefore refused to send him any renewal receipts; and refused to pay out his interest in the policies then in force, and insisted that he had forfeited all interest therein.

The court charged the jury, among other things, "that the plaintiff was entitled to recover whatever damages he had sustained by the defendant's wrongful interference, if the evidence showed such interference, with his renewal interest in the renewal premiums on the policies procured by him, and through his agency, and which were of force on the 1st September, 1878." The defendant excepted to this charge, and requested the court, in writing, to instruct the jury, "if they believed the evidence, they must find for the defendant;" and the defendant excepted to the refusal of this charge.

There are twenty-four assignments of error, embracing the adverse rulings of the court on the pleadings, the several rulings on evidence to which exceptions were reserved, the charges given, and the refusal of the charges asked.

AIKEN & MARTIN, for appellant. (No brief on file.)

DENSON & DISQUE, *contra*.—(1.) The third count is in case, and shows a good cause of action. The contract is stated as mere inducement to show the respective obligations of the parties, and the *gravamen* is the breach of duty and consequent injury to the plaintiff.—*Blick v. Briggs*, 6 Ala. 687; *Hussey v. Peebles*, 53 Ala. 432; *Nabring v. Bank*, 58 Ala. 204; *Samuel v. Judin*, 6 East, 333; *Smith v. White*, 8 Dowl. 255; *Wilkinson v. Mosely*, 18 Ala. 288; s. c., 24 Ala. 411; *Meyers v. Gilbert*, 18 Ala. 467; *Enigh v. Railroad Co.*, 4 Biss. C. C. 114; 1 Chitty's Pl. (16th ed.) 151-52. (2.) The third count being in case, there was no misjoinder, and no departure from the original complaint.—*Dixon v. Barclay*, 22 Ala. 370; *Wilkinson v. Mosely*, 30 Ala. 563. (3.) The proof fully sustained

[Mobile Life Insurance Co. v. Randall.]

the allegations of the third count, and the plaintiff was entitled to recover the damages which the charge of the court allowed him.—*Wilcox v. Plummer*, 4 Peters, 172; *Everson v. Powers*, 89 N. Y. 527; *Allison v. Chandler*, 11 Mich. 542; *Masterson v. Brooklyn*, 7 Hill, N. Y. 61; *Whitney v. Slayton*, 40 Maine, 224; Sedgw. Dam. 119–23; Wood's Mayne on Damages, §§ 103–4; 31 Vermont, 582; 23 N. H. 83; 4 Dall. 147; *Crow v. Boyd*, 17 Ala. 51; *Strother v. Butler*, 17 Ala. 733.

STONE J.—The original complaint in this case is in trover, and contains two counts. The suit was commenced in April, 1879. At the Fall term, 1882, the complaint, with leave of the court, was amended by adding a third count. The defendant demurred to the complaint, as amended, assigning as one of the grounds that there was a misjoinder of count, in this, that the first two counts are in trover, and the third in assumpsit. If this be true, then the demurrer ought to have been sustained; for trover, which is *ex delicto*, can not be joined in the same action with assumpsit, which is *ex contractu*. Furthermore, on the hypothesis that the third count is in assumpsit, its allowance would have been the introduction of a new cause of action, a departure from the wrong complained of in the first two counts, and not allowable, even under our liberal system of amendments.—*Crimm v. Crawford*, 29 Ala. 623; *Johnson v. Martin*, 54 Ala. 271; *Simpson v. M. & C. R. R. Co.*, 66 Ala. 85; *Steed v. McIntyre*, 68 Ala. 407. For the appellee it is contended, that the third count is in case. Counts in trover and in case may be joined in the same action (1 Brick. Dig. 24, § 54), while assumpsit and trover cannot be so joined.—*Ib.* 24, § 53.

The history of the action on the case, or special action on the case, as it was originally called, is well known to the profession. It is not one of the original common-law writs. In the progress of judicial contestation, it was discovered that there was a mass of tortious wrongs, unattended by direct and immediate force, or where the force, though direct, was not expended on an existing right of present enjoyment, for which the then known forms of action furnished no redress. The action on the case was instituted to meet this want. It may then be styled a suppletory, personal action, *ex delicto*. It was designed to be residuary in its scope, but is always classed among the actions in tort.

For mere breaches of ordinary contracts, without more, this action will never lie; for, in such breach of promise, there is no element of tort, in the legal sense of that term,—“a wrong independent of contract.”—Bouvier's Dic. Nevertheless, wrongs which will maintain an action on the case are frequently

[Mobile Life Insurance Co. v. Randall.]

committed in the non-observance of duties, which are but the implication of contract-obligation. Contracts have a leading, primary obligation—to do a specified act; to perform a specified service; or to pay or deliver a specified thing of value. A mere failure to perform such a contract-obligation is not a tort, and it furnishes no foundation for an action on the case. But contracts, however briefly expressed, are to be interpreted in the light of great legal principles, which enter into and permeate all human transactions. Hence, the duty of requisite skill, fidelity, diligence, and a proper regard for the rights of others, is implied in every obligation to serve another. The degree of these qualifications is graduated by the nature of the service undertaken; but they inhere in, and form a part of all dealings between man and man. The observance of these duties is necessary to the peace, good order and success, of all municipal regulation. Now, for a breach of the contract-obligation, the remedy is an action *ex contractu*. If the implications, or collateral duties of the service, be disregarded, and injury ensue, this is a tort, for which an action on the case will lie.

Mr. Justice Parsons, in *Wilkinson v. Mosely*, 18 Ala. 288, said: "Perhaps the best criterion is this: if the cause of action, as stated in the declaration, arises from a breach of promise, the action is *ex contractu*; but, if the cause of action arises from a breach of duty growing out of the contract, it is in form *ex delicto*, and case." In 2 Wait's Ac. and Def. 100, the doctrine is thus stated: "When there is a contract, either express or implied, from which a common-law duty results, an action on the case lies for the breach of that duty; in which case, the contract is laid as mere inducement, and the tort arising from the breach of duty as the *gravamen* of the action. Thus, if a lawyer or physician is engaged by special contract to render professional service, and, in the performance of such service, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract." See, also, *Pomery on Rem.* §§ 567, 573.

Justice Parsons, in *Wilkinson v. Mosely*, *supra*, illustrates his view of the question as follows: "If the declaration allege the hiring of a horse to ride to a certain place, and that the defendant rode him so immoderately that he died, this would be case; for the contract of hiring imposed upon him the duty to ride in reason, or not unreasonably fast. But, if the declaration allege the hiring, and that he promised to ride with reasonable speed, but, not regarding his promise, he rode the horse immoderately, whereby he died, the action may be considered *assumpsit*." We do not doubt that *assumpsit* would lie in the case last supposed; but case would lie also. It was

[Mobile Life Insurance Co. v. Randall.]

a case, not only of a breach of contract, but a violation of a duty enjoined by law, and therefore a tort.—*Blick v. Briggs*, 6 Ala. 687; *Myers v. Gilbert*, 18 Ala. 467. In such case, the pleader has the option to sue in assumpsit, for the breach of the contract; or in case, for the violation of the duty imposed by law. Wherever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, an action on the case lies in favor of the party injured; and if the transaction had its origin in a contract, which places the parties in such relation as that, in performing or attempting to perform the service promised, the tort or wrong is committed, then the breach of the contract is not the *gravamen* of the suit. There may be no technical breach of the letter of the contract. The contract, in such case, is mere inducement, and should be so stated in pleading. It induces, causes, creates the conditions or state of things, which furnishes the occasion of the tort. The wrongful act, outside of the letter of the contract, is the *gravamen* of the complaint; and in all such cases, the remedy is an action in the case. Take, for illustration, the contract of a carpenter to repair a house, partly decayed, or otherwise defective. The implications of his contract are, that he will bring to the service reasonable skill, good faith, and diligence. If he fail to do the work, or leave it incomplete, the remedy, and only remedy against him, is *ex contractu*. Suppose, in the attempted performance, he, by his want of skill or care, destroys, damages, or needlessly wastes the materials furnished by the hirer; or, suppose that in making the needed repairs, he did it so unskillfully or carelessly as to damage other portions of the house; this is tort, for which the contract only furnished the occasion. The contract is mere inducement, and the action is on the case. We may add, that there are many cases in which the pleader has the election of suing in assumpsit or case.

In the third count, or amended complaint, we find this averment: "Plaintiff avers that the defendant, disregarding the rights of plaintiff under said agreement, and in violation of said agreement, did, to-wit, on the 1st day of September, 1878, wrongfully discharge plaintiff from its said service." This averment, it is contended, if all others fail, fixes the character of this count as in case. The vice of this argument lies in this: The complaint shows that plaintiff was the agent of the defendant corporation, and it entirely fails to show that his appointment was for any given time, except from year to year, or that, at the time of his alleged discharge, he was acting as agent by virtue of any appointment, or renewal of appointment. The count avers that plaintiff became defendant's

[Mobile Life Insurance Co. v. Randall.]

agent on the — day of —, and “that the contract was renewed from time to time, until, to-wit, on the 3d day of April, 1876, the said contract or agreement was so modified as to give or entitle plaintiff” to an increased rate of commissions. Not a word said about the renewal of his appointment, or the duration of any appointment he had received. So, it does not appear, either by averment, or even by inference from any averred fact, that at the time of the alleged unauthorized discharge, he was the appointed agent of defendant, or in fact was, in any sense, the defendant’s agent. The renewal contract was in April, 1876, while the alleged discharge was in September, 1878,—nearly two and a half years afterwards. A fact so important to plaintiff’s rights can not be taken by inference. He can not have been wrongfully discharged, unless he shows he was in the service by virtue of appointment, or renewal of appointment; or, at all events, that he was in the service, and in the performance of his duties as such agent.

The third count, then, is narrowed down to this: It avers that, under the terms of the modified contract of April, 1876, plaintiff was entitled to a certain per-cent. on annual renewals of a given number of policies, for and during the term of his natural life, which it avers would amount to a named sum. The breach assigned is, that defendant denies plaintiff all right to said renewal premiums, or any interest therein, and still refuses to recognize plaintiff’s interest therein. There is not an element of legal tort in the averments of this count. If a denial of liability to pay money, claimed by another, be a tort that will maintain an action on the case, then that action has a very wide scope; much wider than the appellee himself would contend for.

We have carefully examined the facts and history of this case, and, basing our judgment alone on the two contracts of February, 1874, and April, 1876, and the testimony of plaintiff himself, we announce the following conclusions: 1. There is no conversion that will maintain the action of trover. 2. If the defendant corporation discharged plaintiff from its service, the latter’s prior violation of the contract of February, 1874, justified it in so doing. The facts will not support an action on the case.

It results from these principles, that the present complaint can not be so amended as to authorize a recovery. If the plaintiff has any cause of action, it is for his interest in the renewal premiums as they are realized.

Reversed, but the cause need not be remanded.

Hinson v. Williamson.

Bill in Equity by Personal Representative of Deceased Administrator, for Settlement of Administration, and Account against Surviving Administrator.

1. *Testamentary trusts; jurisdiction of Probate and Chancery Courts.* The Probate Court has no jurisdiction to enforce and settle a trust created by will; but, when such trust is conferred upon the executor, and distinct executorial duties are also devolved upon him by the will, that court, while declining to take cognizance of the trust, may settle all matters which pertain only to the executorial duties and office; unless the duties of the trust are attached to the executorial office or character, and are so inseparably blended and mingled with the executorial duties that they can not be distinguished from each other; in which case, if the trustee has accepted and undertaken the duties of the trust, the Probate Court has no jurisdiction to execute the will, and the parties will be remitted to the Chancery Court.

2. *Testamentary power; by whom executed.*—A power conferred by will, implying personal confidence in the donee, can only be exercised by the person named; and if he disclaims, or refuses to execute the trust, the power will be considered as revoked and absolutely annulled.

3. *Will authorizing executrix to keep estate together, and buy or sell property at discretion, construed as creating personal trust.*—Where the testator appointed his widow as executrix, and relieved her from giving bond; directed that his estate should be kept together “under her absolute power and control, she having full power to purchase or sell any property she may think proper, so long as she remains a widow;” that the annual profits of the estate should be invested by her in making purchases of property at her discretion, to be distributed among the children so as to equalize their distributive shares; and made provision for the immediate distribution of the estate, in the event of her death or marriage; held, that the will imposed upon the widow a personal trust in the matter of keeping the estate together, which was capable of execution by her alone; and she having refused to accept the trust, or qualify as executrix, the Probate Court could not confer on administrators *de bonis non* the power to execute it.

4. *Liability of trustees for acts and defaults of each other.*—The general rule is, that trustees are not ordinarily liable for the acts or defaults of each other, but each is liable only for such sums of money as he may receive in the due course of his fiduciary duties; yet, if one knowingly permits or acquiesces in a breach of trust or wrongful act of the other, or otherwise participates in a *devastavit* by him, he will be held liable as a co-principal; and also when, by his voluntary co-operation or connivance, he enables the other to accomplish some known object in violation of the trust.

5. *Liability of administrators for acts and defaults of each other.* When two administrators give a joint bond, and make a joint application to the court for an order to keep the estate together (one of them advancing moneys, from time to time, to carry on the business of the plantation, which was conducted under the immediate management of the other, and receiving a portion of the crops raised), and jointly account

[Hinson v. Williamson.]

on their partial settlements with the court; they are jointly liable, as co-principals, to account for the profits of the farming business so carried on, without regard to the particular part or sum received by each; and in such case, a final settlement in the Probate Court, made by the surviving administrator, while it might operate as a discharge of the liability of the deceased as surety on the joint administration bond, would not affect his liability as co-principal on account of his participation in any *destravit* committed by the survivor during their joint administration.

6. *Keeping estate together under order of court.*—When an estate is kept together under an order of the Probate Court (Code, § 2602), the administrator has no authority to keep up the family establishment, and to support the family at the expense of the estate; but the reasonable expenses of the several members of the family, on a basis corresponding with their fortune and condition in life, should be charged against each separately as incurred by them, and not *in solido* against the estate.

7. *Same; authority of administrator, and compensation for extra services.*—Such authority to keep the estate together carries with it the incidental power to employ all ordinary means which are necessary and proper to effectuate the express power; hence, all expenditures reasonably necessary to cultivate the plantation, make, gather, and dispose of the crops, should be allowed, including, probably, a fair compensation to the administrator for his services in these matters.

8. *Keeping estate together without authority; election by distributees; interest on rents.*—When an administrator keeps an estate together without an order of court, and without authority under the will, the distributees may, at their election, either take the profits, or charge him with rent for the use of the property; if they elect to take the profits, an allowance must be made to the administrator for all reasonable expenses incurred in making them; and if they elect to charge him with the rents, interest thereon must be computed against him.

9. *Error without injury in statement of account.*—On statement of the accounts of a deceased administrator, under a bill filed by his personal representative, an overcharge against him, or the refusal of a proper credit, is error without injury, when the record shows that the distributees remitted a larger balance found against him; the *remittur*, in such case, will be referred to, and will cure, the specific errors in the account.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JNO. A. FOSTER.

The original bill in this case was filed on the 17th November, 1877, by Joseph L. Hinson, as the administrator *de bonis non* of the estate of Joseph H. Hall, deceased, against James S. Williamson individually, and as surviving administrator of the estate of A. F. Williamson, deceased, against the widow and children of said A. F. Williamson, as legatees and devisees under his will, and as his heirs at law and distributees of his estate; and sought, 1st, a settlement of said Hall's administration on the estate of said A. F. Williamson; 2d, an account against said James S. Williamson, in the matter of his administration of said estate as co-administrator with said Hall; 3d, the appropriation and application, by order of the court, of the amount due on a decree which said James S. Williamson had obtained, after the death of said Hall, against the heirs and distributees of the estate of said A. F. Williamson, on final settlement of his own accounts as administrator of said estate, to the

[Hinson v. Williamson.]

payment of an alleged balance due to said Hall on joint administration account; and, 4th, the subjection of the lands belonging to the estate of said A. F. Williamson, in the possession of his widow and children, to the satisfaction of said decree, or of the amount which might be found due to complainant, as administrator, on settlement of said Hall's administration.

Said A. F. Williamson died in 1868, in Lowndes county, where he resided, leaving a widow and seven surviving children, some of whom were married, and others minors, and also several grandchildren; and being possessed of a residence in Lowndesboro, and a plantation in Autauga county, fifteen or twenty miles distant. His last will and testament, which was executed in 1863, and duly admitted to probate in said county after his death, contained the following provisions: "*Item 1.* It is my will and desire, that all my just debts shall be paid, as soon as possible after my death." 2. "It is my will and desire, that my entire estate shall be kept together, under the absolute management and control of my beloved wife, Martha Williamson; she, my beloved wife, having full power to purchase or sell any property she may think proper, so long as she, my wife, remains a widow." 3. "It is my will and desire, also, that as my children shall come of age, or marry, that my said wife shall, from the annual profits of my estate (if enough for said purpose), purchase and give to each, as nearly as possible, the same amount of property as I have already given to my son William F. and my daughter Susan E., wife of Joseph H. Hall, having reference more to the amount of the property than the value of the same in money, until all of my children shall have received a like portion; and if enough is not made from my estate to do this, then the deficiency to be made up from the property already in possession." 4. "In the event that my said wife should marry, it is my will and desire, that she shall receive a child's share of my entire estate, for her own use, benefit and behoof, and the remainder of my estate be equally divided between all of my children, each receiving share and share alike, as directed in item 3." 5. "In the event of my wife's death without marriage, it is then my will and desire, that my entire estate shall be equally divided between all of my children, share and share alike." 6. "To carry out this my last will and testament, I hereby constitute and appoint my beloved wife my sole executrix, relieving her of the necessity of giving bond, and making any return to the Probate Court. In testimony whereof," &c.

Mrs. Williamson, the widow, having renounced the right to letters testamentary, letters of administration with the will annexed were duly granted by the Probate Court of Lowndes, on April 3d, 1869, to said Joseph H. Hall and James S. William-

[Hinson v. Williamson.]

son, as co-administrators; and they thereupon executed a joint bond, and entered upon the discharge of the duties of the administration. On the 3d May, 1869, they returned a partial inventory of the property belonging to the estate, and on the 27th May a supplemental inventory; and on the 29th December, 1869 they obtained an order from the court in these words: "Came James S. Williamson and Joseph H. Hall, administrators of said estate, and made application for an order authorizing them to keep together the said estate for the next twelve months; and it being shown to the satisfaction of the court that it will be to the interest of said estate to keep it together for one year at least, it is therefore ordered, adjudged, and decreed, that said administrators be, and they are hereby, authorized to keep said estate together for the year 1870." On the 18th January, 1871, they obtained an order of the court authorizing them to "rent privately the lands belonging to said estate;" the order reciting that, from the evidence adduced, the court was satisfied "that it will be to the interest of said estate to rent the lands privately;" and they were required to report the renting to the court for approval. On the 10th April, 1873, an order was granted by the court, reciting that said administrators filed their petition, "in which it is alleged that the lands, and stock and supplies thereon, belonging to said estate, can not be rented out with advantage to the estate, and, having the plantation well stocked and supplied with labor, it would be to the best interest of the heirs and distributees of said estate that the same should be kept together and cultivated this year (1873), and asking that an order may be granted authorizing them to keep together and cultivate said plantation; and the court being satisfied as to the facts set forth in said petition, it is therefore ordered and decreed, that said petition be granted, and that said administrators be, and they are hereby, authorized to cultivate said plantation for the year 1873." While the estate was kept together under these orders, and during other years in which no orders of court were procured, the plantation was under the active superintendence and control of J. S. Williamson, one of the administrators; and money was advanced to him, from time to time, by Hall, his co-administrator, for the purchase of supplies and other necessary uses. During this time, and for several years afterwards, Mrs. Williamson and her family continued to occupy the family residence, and their expenses were paid by the administrators out of the assets of the estate.

In August, 1872, the administrators made an annual (or partial) settlement of their accounts, charging themselves with debits amounting to \$12,916.38, and claiming credits to the amount of \$12,989.78; and the account as stated was audited

[Hinson v. Williamson.]

and allowed, showing a balance of \$73.40 in favor of the administrators. In August, 1873, they made another partial settlement, in which they charged themselves with debits amounting to \$14,783.54, and claimed credits amounting to \$17,838.45, showing a balance of \$3,054.91 in their favor; and their account as stated was audited and allowed by the court. In April, 1875, they made a third annual (or partial) settlement of their accounts, charging themselves with debits to the amount of \$2,391.20, and claiming credits to the amount of \$3,991.54, showing a balance of \$1,600.34 in their favor; and their account, as thus stated, was audited and allowed by the court.

Joseph H. Hall died, intestate, in November, 1876, never having made a final settlement of his accounts as administrator of the estate of said A. F. Williamson, and letters of administration on his estate were duly granted to his widow; and on her death in September, 1877, letters of administration *de bonis non* were granted on the 13th November, 1877, to the complainant in this cause. After the death of said Hall, James S. Williamson, as surviving administrator, continued in the administration of said A. F. Williamson's estate, until December, 1876, when he filed his accounts and vouchers for a final settlement; and on the final settlement thereupon had, in January, 1877, a balance of \$4,803.61 was decreed in his favor. In this settlement, said administrator claimed, and was allowed, credit for the two items of \$3,054.91 and \$1,600.34, balances ascertained on the former partial settlements, as above stated. The bill alleged that the greater part of these balances, as ascertained and allowed on said settlements, was in fact due to complainant's intestate, said Joseph H. Hall, on account of his administration of said estate jointly with said James S. Williamson; that a large sum in addition thereto, to-wit, \$7,000, was also due to said Hall from the estate of said A. F. Williamson, on account of said administration; and that certain lands, of which the surviving administrator had put the widow in possession, were the only remaining assets of the estate of said A. F. Williamson. On these facts and allegations, the bill prayed a final settlement of Hall's accounts as administrator of A. F. Williamson's estate; an account against James S. Williamson, the surviving administrator, of their joint administration; an injunction against the collection by said James S. Williamson of the decree in his favor, until the accounts between him and Hall were stated; that said decree might stand as a security, in favor of the complainant, for the balance ascertained to be due to his intestate on settlement of the joint administration account, and that the lands might be subjected, under the decree of the court, to the payment of the balance thus ascertained.

[Hinson v. Williamson.]

An answer to the bill was filed by James S. Williamson, alleging that, at the time letters of administration were granted to him and Hall, jointly, "it was understood and agreed between them that respondent should have and exercise the sole control of the administration of said estate, as between themselves, and that said Hall should be relieved from the care, trouble and responsibility of said administration; and that respondent should collect and receive all moneys due the estate, pay all the debts and liabilities of the estate, and have and exercise all care, conduct and management of the plantation and other property belonging to the estate, and should [?] exclusively for himself all the compensation which might be allowed by law for his services and responsibility as such administrator; and in pursuance of such understanding and agreement, respondent did have and exercise all the care, conduct and management of said estate, giving his personal and undivided attention to the same, particularly in cultivating and managing the said plantation, hiring laborers, superintending the gathering of crops, selling the same, renting out land, collecting rents, and paying all expenses and debts of the estate." He alleged that, while Hall did pay some of the debts of the estate, he was repaid by respondent out of the assets of the estate; that said Hall, at the time of his death, was in fact largely indebted to the estate, on account of assets which he had received; that no part of the balances ascertained to be due to the administrators on their partial settlements, or of the balance found due to respondent on his final settlement, was due or owing to Hall; and he added, "Respondent is willing, and now proposes, to open said final settlement, for the purpose of auditing, examining and settling his administration in this court; and he charges that there were other items of payments made by him as such administrator, and sums assumed by him which were proper charges against said estate, but were not embraced in said settlement, and for which he is entitled to credit," specifying two items of \$1,700 and \$700 respectively.

Mrs. Williamson and the adult children adopted the answer of James S. Williamson, and a formal answer was filed by the guardian *ad litem* of the infant defendants. James S. Williamson afterwards died, and the cause was revived against his administrator. At the November term, 1879, the cause having been submitted on the pleadings for a decretal order of reference, Chancellor Austill rendered a decree, assuming jurisdiction of the administration of A. F. Williamson's estate by Hall and James S. Williamson, and ordering the register, as master, to state an account of said Hall's administration; and also to state an account between said Hall and James S. Williamson, in the matter of their administration, showing what

[Hinson v. Williamson.]

part of the balances ascertained to be due to the administrators, on their several partial settlements, was due to said Hall, and what part to said Williamson.

At the March term, 1881, an amended bill was allowed and filed, by which two paragraphs, numbered 9 and 10, were added to the original bill. This 9th paragraph alleged, that the estate of said A. F. Williamson "was kept together, and the said plantation cultivated for the benefit of the estate, by the said James S. Williamson, as one of the administrators thereof, during the whole time said Hall was administrator of said estate; that said James S. Williamson undertook and had sole control and management of the said plantation and the personal property thereon, during the time last aforesaid, and said Hall had no connection with, or part in said management and cultivation, except the payment of large sums of money for the expenses of such management and cultivation; that said Hall received, from the assets of said estate, a small part of the crop of cotton grown on said plantation during said time, which was turned over to him by said James S. Williamson, and which he sold, and charged in accounts kept by him, in his own handwriting, between him and said estate; that said Hall, besides paying the amounts of money for said expenses above referred to, paid large sums in extinguishment and payment of debts contracted by said testator in his life-time, and falling due after his death, and also large sums for the expenses and costs of said administration; and that said James S. Williamson received all the crops from said plantation, and was charged with the proceeds thereof in his said final settlement." The 10th paragraph alleged, that the widow occupied the family residence, with her minor children, and kept up the family establishment, from the time of the testator's death until the final settlement of said J. S. Williamson's administration; that the children were educated, and the expenses of the family were paid out of the assets of the estate, in a manner suitable to their condition in life, and large sums of money were also paid by said Hall, for these purposes, at the request of the widow and several distributees. The amended bill prayed, "that an account be taken of the amounts so paid out by said Hall for the joint use and benefit of said widow and children, and for the use and benefit of each of them severally; and that said amounts be decreed to be paid to complainant out of the proceeds of sale of said lands."

An answer to this amended bill was filed by the administrator *ad litem* of the estate of James S. Williamson, adopting his intestate's answer to the original bill, and demanding proof of the additional allegations of the amended bill; and a formal answer was filed by the guardian *ad litem* of the infant de-

[Hinson v. Williamson.]

fendants. Mrs. Williamson and the other adult heirs withdrew, by leave of the court, their answer adopting the answer of James S. Williamson to the original bill, and filed a full answer to the bills, original and amended. They alleged that said administrators not only gave a joint bond, but acted jointly in the management and conduct of the estate, jointly obtained orders of court, and were jointly liable for the acts of each other; that they kept up the plantation, hired laborers, and contracted debts, without any legal authority; that during the years 1870 and 1871, when they had procured orders from the court for the renting out of the lands, they rented the same to said James S. Williamson, for the nominal rent of \$2,500, which was not one third of the amount realized by him from the cultivation of the plantation; and they claimed the right to elect, during each of the years while the estate was kept together, whether they would charge the administrators with reasonable rents, or take the profits realized by the cultivation of the plantation. They denied the finality and impeached the correctness of the partial settlements, and insisted that the final settlement was void for want of jurisdiction. They denied that, on a fair settlement, the estate of said A. F. Williamson would be found indebted to said administrators jointly, or to said Hall; and pleaded the statutes of limitations of three and six years, against the attempt to charge the lands with or on account of debts contracted by said administrators, or either of them.

In the statement of the accounts under the order of reference, the register reported a balance due to Hall's estate, from the estate of A. F. Williamson, of \$7,359.50, but numerous exceptions were taken by the respondents to his rulings and conclusions; and the cause being submitted to the chancellor (Hon. Jno. A. FOSTER) on these exceptions, he set aside the report, and ordered a new statement of the matters of account. In an opinion accompanying his decree, and made a part of it, the chancellor held, 1st, that the provisions of the will as to keeping the estate together, buying and selling property, created a personal trust in the widow, which could not be devolved upon the administrators with the will annexed, nor be executed by them; 2d, that the administrators, having given a joint bond, and acted jointly in the matters of administration, were liable as joint principals for the acts and defaults of each other; 3d, that the orders of court for keeping the estate together, during the years 1870 and 1873, authorized the hiring of laborers and cultivation of the plantation during those years; 4th, that for the other years during which the estate was kept together without authority, the distributees had a right to elect whether they would ratify the acts of the administrators, and

[Hinson v. Williamson.]

take the profits realized, or repudiate their acts, and charge them with rents; 5th, that the administrators had no authority, at any time, to keep up the family establishment at the expense of the estate, but must charge the expenses of the several distributees against each as incurred, and must themselves lose all items which could not be thus distributed; 6th, that the partial settlements were to be regarded as *prima facie* correct, but might be impeached by either party on proof of errors or mistakes; and, 7th, that the final settlement of his accounts by James S. Williamson, though conclusive as between his personal representative and the distributees, and also conclusive as to Hall's liability as his surety on the administration bond, did not affect Hall's liability as a co-principal for all acts of administration in which he participated jointly with Williamson.

The accounts being again stated by the register, pursuant to the instructions given in this decree, he reported a balance of \$2,847.59 as due from Hall's administrator to the estate of A. F. Williamson, and a balance of \$2,201.40 in favor of Hall's administrator against the estate of James S. Williamson. The chancellor overruled the complainant's several exceptions to this report, and confirmed it; and thereupon decreed as follows: "It appearing to the court that, in the settlement between the estate of J. H. Hall and J. S. Williamson, said Hall's administrator was entitled to the full sum of the decree heretofore rendered by the Probate Court of Lowndes county, in favor of said J. S. Williamson, against the estate of said A. F. Williamson, and that said Hall's estate has received payment thereof in full, by credit in this settlement with the estate of A. F. Williamson; it is ordered, adjudged, and decreed, that said decree of said Probate Court be satisfied, cancelled, and of no force. And it further appearing that a large sum is shown by the register's report to be due from the administrator of J. H. Hall on this settlement with the estate of said A. F. Williamson, and that the defendants' now come into court, and waive all claim and demand against the estate of said J. H. Hall for and on account of such balance so ascertained; it is further ordered, adjudged, and decreed, that said complainant, as administrator of the estate of said J. H. Hall, and the estate of said Hall, be and are hereby released and discharged from all liability by reason of said Hall's having been administrator of the estate of said A. F. Williamson, whether under the will or by appointment of the Probate Court of Lowndes county; and that the estate of said A. F. Williamson, and the trustee under his will, be discharged from all liability to said Hall's estate by reason of the same."

The appeal is sued out by the complainant, and he here assigns as error the instructions to the register as to the state-

[Hinson v. Williamson.]

ment of the account, the overruling of his several exceptions to the register's reports, and each of the chancellor's decrees; the assignments of error being thirty in number, and embracing all the rulings of the chancellor adverse to the complainant.

WATTS & SONS, and E. J. FITZPATRICK, for appellant.—1. The general intent of the testator, as manifested by his entire will, must prevail over the particular; and that intent was the disposition of his property, in the manner, and upon the events specified in the 3d, 4th, and 5th items of the will. The shares were defined, and distribution directed to each child, on marrying or attaining majority, or to the widow and children on her marriage, or to all the children on the death of the widow; and distribution, on the happening of any of these events, was mandatory, positive, and without discretion. Each child had an undoubted right to enforce distribution of his share, on the occurrence of the event specified; and distribution to each, on marriage or majority, was necessarily to be made at different times. To give effect to this general intention, it was indispensable that the estate should be kept together; and the duty of doing this, in order that distribution might be made as provided, necessarily devolved upon the person by whom the will was executed—by the widow, if she qualified as executrix; otherwise, by the administrators with the will annexed. Keeping the estate together was an executorial duty, entirely distinct from the “absolute management and control,” and the power to “purchase and sell” property, reposed as a personal trust in the widow. If the estate could only be kept together by the widow and executrix, her failure to qualify produced a case of intestacy, and the estate was liable to be distributed at the end of eighteen months from the grant of administration. In the following cases, similar provisions were held to create executorial duties, and not trusts: *Savage v. Benham*, 11 Ala. 49; *Smith v. King*, 22 Ala. 558; *Smith v. Kennard*, 38 Ala. 700; *Charles v. Stickney*, 50 Ala. 88; *Shipp v. Wheless*, 33 Miss. 646; *Lowe v. Barnett*, 38 Miss. 329; *Hancock v. Titus & Co.*, 39 Miss. 224; *Matthews v. Meek*, 23 Ohio St. 289; *Hinton v. Powell*, 1 Jones, N. C. 230.

2. If keeping the estate together was not an executorial duty, it was not a trust of personal confidence which died by the widow's failure to accept it. The limitations of the estate depended upon the exercise of that power; it was a power coupled with a trust, the execution of which a court of equity would have enforced for the benefit of the beneficiaries. Such a trust survives, and may be executed although the trustee declines to act.—1 Perry on Trusts, §§ 248-9; 2 Story's Equity, § 1062; 2 Washb. Real Prop. 325, mar.; *Peter v. Beverly*,

[Hinson v. Williamson.]

10 Peters, 563; *Osgood v. Franklin*, 2 John. Ch. 1-20; *Franklin v. Osgood*, 14 John. 529, 553. If the administrators had applied to the Chancery Court, that court would certainly have directed them to keep the estate together, because the provisions of the will required it; and having done so without its order, that court will ratify and approve their action.—2 Perry on Trusts, 5, 544-5; *Foscoe v. Lyon*, 55 Ala. 455.

3. Whenever the will requires an estate to be kept together, the widow and children are to be supported out of it, though the will may contain no such express provision.—*Worley v. High*, 40 Ala. 171; *Clopton v. Jones*, 38 Ala. 121; *Wynne v. Walthall*, 37 Ala. 37; *Coleman v. Camp*, 36 Ala. 159; *Moore v. Moore*, 18 Ala. 242; *McLeod v. McDonnell*, 6 Ala. 236. Therefore, the administrators were entitled to credit for expenditures made in supporting the widow and children, in their accounts with the estate; and the court below erred in overruling their exceptions to the register's report as to these matters. Separate accounts against the several distributees, for their separate expenditures, are only necessary when the estate is kept together under the statute.—Code, §§ 2602 *et seq.*

4. The account of Hall's administration should have been stated separately from that of Jas. S. Williamson.—*Davis' appeal*, 23 Penn. St. 206; *Patterson's estate*, 1 Watts & Serg. 391. The original bill prayed this, and the evidence was clear as to what Hall had received, and what he had paid out; that he had paid out \$2,678.25, and had only received \$476.85.

5. Hall was liable as surety for Williamson's acts, by reason of their joint bond; but this liability was discharged by Williamson's final settlement and discharge as principal.—*Jones v. Jones*, 42 Ala. 218; *Turner v. Wilkins*, 56 Ala. 173; *Williams v. Harrison*, 19 Ala. 277. That the Probate Court had jurisdiction to make that settlement, see *Ex parte Dickson*, 64 Ala. 188. That settlement is conclusive, until opened and set aside in equity (on bill filed for the purpose), or reversed on appeal.—*Hutton v. Williams*, 60 Ala. 107; *Stabler v. Cook*, 57 Ala. 22; *Otis v. Dargan*, 53 Ala. 187; *Waring v. Lewis*, 53 Ala. 616; *Modawell v. Holmes*, 40 Ala. 391; *Duckworth v. Duckworth*, 35 Ala. 75; *Cowan v. Jones*, 27 Ala. 317; 15 Ala. 269.

6. Besides his liability as surety, Hall was only liable for those acts of Williamson in which he participated.—*Peter v. Beverly*, 10 Peters, 532; *Turner v. Wilkins*, 56 Ala. 173; *Conner v. Stewart*, 9 Ala. 803; *Taylor v. Roberts*, 3 Ala. 83; *Sutherland v. Brush*, 7 John. Ch. 22; *Knox v. Pickett*, 4 Dess. 92; *Lenoire v. Winn*, 4 Dess. 65; *Williams v. Maitland*, 1 Ired. Eq. 93; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 337; *Williams v. Nixon*, 2 Beav. 472; *Roach v. Hubbard*, Litt. Sel.

[Hinson v. Williamson.]

Cas. 235; *Lawrence v. Lawrence*, 1b. 123; *Johnson v. Johnson*, 2 Hill's Ch. 293; 4 Vesey, 596, note *a*; 11 Vesey, 333; *Brazerv. Clark*, 5 Pick. 96; 2 Lomax Ex'rs, 298, mar.; 2 Wins. Ex'rs, 1119, 1584. The only evidence showing any participation by Hall in the acts of Williamson, was the testimony of J. M. Howard, which was incompetent, and was duly objected to.—*Stuckey v. Bellah*, 41 Ala. 700; *Waldman v. Crommelin*, 46 Ala. 580; *Key v. Jones*, 52 Ala. 238; *Strange v. Graham*, 56 Ala. 614; *Drew v. Simmons*, 58 Ala. 463; *Davis v. Tarver*, 65 Ala. 101. Even if this evidence be admitted, it shows no participation or acquiescence by Hall in any application by Williamson, either rightful or wrongful, of any assets of the estate. Williamson occupied the plantation, as he had the right to do.—*Edwards v. Crenshaw*, 14 Peters, 166. He took all the crops, sold them, and received the proceeds of sale; and for his application of them he has fully accounted. If Hall participated or concurred in any of these acts, so as to make them his own, his liability would only extend to those acts which Williamson had not paid for. As for all items embraced in the final settlement of Williamson, or in the partial settlements carried forward into it, Williamson has accounted; and the bill does not seek to set aside that settlement.

7. As to the alleged error of \$4,812.35 in the partial settlement of 1873, now charged against Hall, the evidence was not sufficient to overturn the presumptive correctness of that settlement. At most, it only shows that a mistake may possibly have occurred; and this is not sufficient.—*Newberry v. Newberry*, 28 Ala. 691; *Brandon v. Cabaniss*, 10 Ala. 155; *Jarrell v. Lillie*, 40 Ala. 273; *May v. Williams*, 27 Ala. 272; *Lindsey v. Perry*, 1 Ala. 204; *Douglass v. Eason*, 36 Ala. 688.

GUNTER & BLAKEY, and R. M. WILLIAMSON, *contra*.—1. The will gives the widow a life estate in the property, charged with the support of the minor children, subject to be defeated on her marriage, and liable to be diminished by advancements made to the children as they arrived at age or married; and in giving her power to keep the estate together, under her absolute control and management, and to buy and sell property at discretion, it creates in her a personal trust, which did not devolve upon the administrators with the will annexed, and which could not be executed by a stranger under appointment from any court. *Tarver v. Haines*, 55 Ala. 506; *Ex parte Dickson*, 64 Ala. 188. An administrator is a mere ministerial officer, whose duty it is to collect the assets, pay debts, and surrender the property to those who may be entitled to it; and he does not succeed to the personal trusts created by the will.—*Camp v. Coleman*, 36 Ala. 163, 169; *Hitchcock v. U. S. Bank*, 7 Ala. 386; *Perkins*

[Hinson v. Williamson.]

v. Lewis, 41 Ala. 649; *Anderson v. McGowan*, 42 Ala. 280; *Ex parte Dickson*, 64 Ala. 188; *Tarver v. Haines*, 55 Ala. 506.

2. The administrators had no authority, under the orders of the court for keeping the estate together, to keep up the family establishment, and support the family at the expense of the estate; but should have charged the expenses of each distributee against him individually.—*Willis v. Willis*, 9 Ala. 335; *Jones v. Dawson*, 19 Ala. 572; *Coleman v. Camp*, 36 Ala. 159; *Pickens v. Pickens*, 35 Ala. 442. Nor did those orders confer on them any authority to hire laborers and cultivate the lands belonging to the estate. If the decedent had been engaged in merchandizing, manufacturing, or any other kind of business, an order for keeping the estate together would not have authorized the administrators to continue that business. Such an order simply means a postponement of the period for distribution, and has no reference to the employment or use of the property. These acts being done without authority, the distributees had a right of election, either to take the profits realized, or to charge the administrators reasonable rents.—*Steele v. Knox*, 10 Ala. 608; *Harrison v. Harrison*, 39 Ala. 489.

3. The administrators gave a joint bond, acted jointly in the management of the estate, and made partial settlements in their joint names. Under these circumstances, they are liable as co-principals for the acts of each other.—*Perry on Trusts*, § 426; *Stewart v. Conner*, 9 Ala. 803; *Scruggs v. Driver*, 31 Ala. 287. Their joint liability is clearly established, without the evidence of Howard, which was objected to; but that evidence was properly admitted, since Howard was only a nominal party, and did not testify as to any transactions with Hall.—*Ala. Gold Life Insurance Co. v. Sledge*, 62 Ala. 569; *Miller v. Clay*, 57 Ala. 162.

4. J. S. Williamson's final settlement of his accounts, however conclusive as between his estate and A. F. Williamson's distributees, is not conclusive on Hall's estate, he not being a party to that settlement; nor does it conclude said distributees in this cause, wherein Hall's administrator seeks a settlement of his administration. Estoppels are mutual; and when Hall's administrator seeks to go behind that settlement, Williamson's distributees must have equal right to impeach it: If an error of \$4,800 occurred in the joint partial settlements, as is clearly shown, and Williamson did not account for it on his final settlement, as is apparent from that settlement, Hall may now be made to account for it. But that settlement does not conclude any one, being void for want of jurisdiction. As to all of their unauthorized acts, the administrators were trustees *in invitum*, and liable to account as ordinary trustees; and the Probate Court had no jurisdiction to settle their accounts.

[Hinson v. Williamson.]

Bailey v. Munden, 58 Ala. 104; *Harrison v. Harrison*, 39 Ala. 478; *Reaves v. Garrett*, 34 Ala. 558; *Wilson v. Moore*, 1 My. & K. 127; 1 Perry on Trusts, § 245.

SOMERVILLE, J.—The question of principal importance is the proper construction of the will of the testator, A. F. Williamson, bearing date November 28th, 1863. The *second item* of the will reads as follows:

“It is my will and desire, that my entire estate shall be *kept together*, under the *absolute management and control* of my beloved wife, Martha Williamson; she, my beloved wife, having *full power to purchase or sell any property she may think proper*, as long as she, my wife, remains a widow.”

The question is, does this clause of the will, aided in interpretation by other parts of the instrument to which we shall advert, impose upon the widow a *personal trust*, capable of execution alone by her, or a mere *executorial duty* which could be performed by the administrators *de bonis non* with the will annexed, Hall and Williamson, who seem to have attempted its execution. This inquiry determines the further and dependent one, involving the jurisdiction of the Probate Court of Lowndes county, authorizing these administrators to carry out this clause of the will.

There are certain well-settled principles of law, derived from the past decisions of this and other courts, which, in our view, present an easy solution of the inquiry.

It can not be doubted that, when a *trust* is created by will, the Probate Courts of this State have no jurisdiction to enforce or settle such trusts.—*Harrison v. Harrison*, 9 Ala. 470; *Johnson v. Longmire*, 39 Ala. 143.

This principle, however, very clearly does not oust the jurisdiction of the Probate Court in all cases where a testator by his will devolves testamentary trusts upon the person appointed executor. Such executor may be regarded as occupying a dual capacity in his relations to the will—that of *trustee*, as well as of an *executor* proper. These two offices are not to be considered as necessarily blended in their official functions.—*Perkins v. Lewis*, 41 Ala. 649; *Perkins v. Moore*, 16 Ala. 9; *Leavens v. Butler*, 8 Port. 380; 1 Perry on Trusts, § 281. The Probate Court, in cases of this nature, may properly undertake to settle up such matters as pertain to the executorial duties or office, and decline to take cognizance of the extraordinary trusts which fall outside of the scope or sphere of the ordinary duties of executors and administrators.—*Ex parte Dickson*, 64 Ala. 188; *Pinney v. Werborn*, 72 Ala. 58.

But, when it can be gathered, from a sound construction of the whole will, that the intention of the testator is to attach

[Hinson v. Williamson.]

the execution of *the trusts to the executorial office* or character, and not to *the person of the executor or trustee*, and the duties of the executor and of the trustee are so blended and mingled as that they can not be distinguished or separated the one from the other—the functions of the two offices being indissolubly linked together—then the Probate Court will decline any jurisdiction to execute the will, but will remit the parties concerned to a Court of Chancery, if the trustee has accepted and undertaken the duties of the trust.—*Ex parte Dickson, supra*; *Perkins v. Lewis*, 41 Ala. 649; *Anderson v. McGowan*, 42 Ala. 280; *Coleman v. Camp*, 36 Ala. 159; *Perry on Trust*, §§ 262, 263.

The rule, moreover, is unquestionable, that powers which imply personal confidence in the donee, when conferred by will, can be exercised alone by the person or persons in whom such confidence is reposed; and if they disclaim, or refuse to exercise the trust, the power will be considered as revoked and absolutely annulled.—*Perry on Trusts*, § 273; *Cole v. Wade*, 16 Vesey, 44; *Wilson v. Pennock*, 27 Penn. St. 238.

The will of the testator in the present case, in our opinion, created such a personal trust in his widow, as authorized her alone to keep the estate together *under the provisions of that instrument*, and the Probate Court of Lowndes county had no jurisdiction to devolve such testamentary duties upon Hall and Williamson, the administrators *de bonis non*. If the will had simply authorized or directed her to keep the estate together, without more, this power would not, of itself, have constituted an extraordinary trust. In *Foxworth v. White*, decided at the last term (72 Ala. 224), we held that such a power was an ordinary executorial duty, because it was one authorized to be conferred on personal representatives by the Probate Court, under the provisions of the statute.—Code, 1876, §§ 2602, 2607. Such is not, however, this case. The power is here conferred upon the inseparable condition, that it be exercised “under the *absolute management and control*” of the testator’s widow, who was also invested with “full power to *purchase and sell any property*” she might think proper, so long as she remained a widow. She was relieved of all necessity of giving bond and security,—itself a circumstance implying confidence. The “annual profits” of the estate she was directed to invest by making purchases of property within her discretion, to be distributed to certain of the children for the purpose of equalizing their distributive shares. If the widow either *died* or *married*, items *four* and *five* make provision for the *immediate distribution of the estate*. It is manifest that extraordinary and unusual powers of management are here devolved by the testator, upon one in whom he had the most implicit confi-

VOL. LXXIV.

[Hinson v. Williamson.]

dence. We can not say that the testator would have been willing for his estate to have been kept together, without the instrumentality of these supplementary powers, which closely approximate powers incident to ownership, and the absence of which would not only cripple the efficiency of the enterprise, but would seem to defeat the substance of his testamentary purpose. Nor are we permitted to say that he would have reposed this confidence or trust in any other person than the one whom he has selected. The power of keeping the estate together is so blended with the discretionary powers expressly conferred in order to carry it out, that we can not undertake to separate and distinguish them. It conferred a personal trust upon the widow, and, in view of her refusal to accept it, the Probate Court had no jurisdiction to execute the will. The settlements made, therefore, in this court, of the administrations of Hall and Williamson were incorrect, so far as they were conducted upon the theory of the existence of such jurisdiction. The views of the chancellor, as expressed in his opinion, fully accord with these principles.

The next inquiry of importance is, how far Hall was liable for the acts of his co-administrator, Williamson, in attempting to keep the estate together under the authority of the will.

The general rule is, that one trustee is not ordinarily held liable for the acts, defaults or *devastavits* of his co-trustee, each one being liable only for such sums of money as he may receive in the due course of his fiduciary duties.—2 Perry on Trusts, §§ 415, 421. But he will be adjudged liable as a co-principal, if he stands by, and knowingly permits, or acquiesces in a breach of trust or wrongful act of a co-trustee, or otherwise participates in a *devastavit* by him.—*Ib.* §§ 419, 454. So, if one trustee, by his voluntary co-operation, or connivance, has enabled one or more to accomplish some known object in violation of the trust.—2 Story's Eq. (12th Ed.) § 1280; *Taylor v. Roberts*, 3 Ala. 83. The giving of a joint bond is an agreement to be expressly liable each for the other.—*Pearson v. Darrington*, 32 Ala. 227. And the accounting together jointly to the court, or other like act of co-operation, is generally construed a holding themselves out as acting together, and assuming a joint liability.—*Scruggs v. Driver*, 31 Ala. 287; *Stewart v. Conner*, 9 Ala. 803; 2 Perry on Trusts, § 419. It is said by Mr. Story, that trustees are liable each for the other, "if it is *mutually agreed* between them that one shall have the *exclusive management of one part of the trust property*, and the other of the other part" (2 Story's Eq. § 1284),—a proposition which is amply sustained by authority, as well as supported by reason.—*Knight v. Haynie*, at present term; *Jones' Appeal*, 42 Amer. Dec. 291. It is upon this principle that it has

[Hinson v. Williamson.]

been held, where trustees appointed one of their number to be *factor* to their trust estate, that they would be liable for his defaults as agent, though not as trustee, in the same manner that they would be for the defaults of any third person whom they might appoint to the same agency.—*Howe v. Pringle*, 8 Cl. & Fin. 264; *Jones' Appeal*, *supra*, 42 Amer. Dec. 291.

The administrators, Hall and Williamson, are shown to have executed a joint bond. They applied jointly to the Probate Court for authority to keep the estate together under the statute. Hall advanced various sums of money, for the purpose of carrying on the farming business, and is shown to have received a portion of the crops raised on the plantation. So, it seems to have been mutually agreed, that Williamson should take charge of this part of the administration; and although Hall may have had nothing to do with the active superintendence and management of the farming transactions, he is sufficiently shown to have co-operated in and authorized them. The testimony shows, furthermore, that the two jointly united in accounting together to the Probate Court, until the death of Hall, which occurred in November, 1876.

In our judgment, there is sufficient testimony in the record, exclusive of that of Howard, to support the finding of the chancellor, that the act of keeping the estate together under the immediate management of Williamson, was the co-operate act of both administrators, and imposed a liability upon each of them, as joint principals, to account for the profits of the farming business, irrespective of the particular sum of the proceeds received by either. And, although the settlement made by Williamson in the Probate Court, be regarded as a discharge of Hall's liability, in his capacity as *surety* on the administration bond, yet this would not affect or discharge the super-added liability incurred as a co-principal, by reason of Hall's participation in any *devastavit* committed by Williamson. The chancellor places his liability upon the latter ground; and in this, we think, his decree is free from error.

The administrators, as we have seen, derived no power from the will to keep the estate together. Their only authority to carry on the farming operations must be derived from such occasional orders as were procured to this end from the Probate Court, under the provisions of the statute.—Code, 1852, § 1902; Code, 1876, § 2602. This statute clothed them with no authority to keep up the family establishment, or to support the decedent's family at the expense of the estate.—*Pickens v. Pickens*, 35 Ala. 442.

In such cases, the reasonable expenses of the family should be apportioned among the several distributees separately, so as to constitute a charge upon the share of each. They can not

[Hinson v. Williamson.]

be charged *in solido*, without reference to the particular member of the family on whose account such expenses were severally incurred. The style of living is authorized to be maintained upon a basis corresponding with the fortune and social position or condition in life of the parties.—*Pinckard v. Pinckard*, 24 Ala. 250; *Pickens v. Pickens*, *supra*.

Where an administrator, or executor, is not authorized to keep an estate together, either by will or by authority of the Probate Court, he does so at his own hazard, and the distributees may elect to take the profits, or to charge him with rent for the use of the property.—*Steele v. Knox*, 10 Ala. 608.

If they elect to take the *profits*, an allowance must, of course, be made for all reasonable expenses incurred in making them. They will be entitled, in other words, only to *net*, and not to *gross* profits.—*McCreliss v. Hinkle*, 17 Ala. 459; *Harrison v. Harrison*, 39 Ala. 489; *Steele v. Knox*, *supra*.

Where rents are chargeable, interest will be allowed from maturity; the general rule being, that interest is always to be allowed, as the legitimate fruit of principal.—*Harrison v. Harrison*, 39 Ala. 489.

The power to keep the estate together carries with it the incidental authority of employing all ordinary means, which may be necessary and proper to carry out such express power. Hence, all expenditures are allowable which are reasonably necessary in order to cultivate the plantation, make, gather, and dispose of the crops.—*Pinckard v. Pinckard*, 24 Ala. 250; *Gerald v. Bunkley*, 17 Ala. 170.

This would probably include a fair compensation for the services of the administrator, which may be considered as extraordinary in their character.—*Harris v. Martin*, 9 Ala. 900; *Craig v. McGehee*, 16 Ala. 41.

The foregoing principles are all applicable to the present case, in view of the fact that the administrators omitted to procure authority from the Probate Court to keep the estate together, during several years of their administration, while during other years they did procure such authority. The chancellor seems to have observed all of these rules, in passing upon the exceptions to the register's report, except the last, allowing compensation to the administrators for extraordinary services performed in carrying out the orders of the Probate Court empowering them to keep the estate together. This error, however, and such other minor ones as we have been able to discover in the account, are more than over-balanced by the large amount shown by the report of the register to be due from the estate of J. H. Hall, in the matter of this administration,—a claim to which was waived in open court by the defendants, who declined to take judgment for it. It is obvious

[Wilkinson v. Stuart.]

that any errors in the account, less in amount than the sum thus voluntarily remitted, would be errors without injury, as against the complainant. The *remittitur* will be construed, in other words, to embrace these identical errors.

We do not consider the assignments on the cross-appeal by the defendants, as they are agreed to be abandoned in the event of our refusal to reverse the decree on direct appeal. We are requested by counsel not to consider them, in case of an affirmance of the chancellor's decree as rendered.

We discover no error in the record, and the decree is affirmed.

Wilkinson v. Stuart.

Bill in Equity for Partition of Lands.

1. *Partition of lands; jurisdiction of equity, as affected by statutory provisions.*—The original jurisdiction of a court of equity to decree partition of lands between co-parceners, joint tenants, and tenants in common, is not taken away by the statutory jurisdiction conferred on the probate judge (Code, §§ 3497–3513); but, if the judge of probate first acquires jurisdiction, by the filing of a proper petition, a court of equity will not interfere with its exercise, unless facts or circumstances of special equitable cognizance are shown, which render inadequate the statutory jurisdiction.

2. *Sale of lands for division; jurisdiction of equity, and of probate judge.*—When lands are held by joint tenants, or tenants in common, who are adults, a court of equity has no jurisdiction to decree a sale in order to effect an equitable division, except by consent; but statutory jurisdiction for this purpose has been conferred on the judge of probate (Code, §§ 3514–20), and it is exclusive as to adult parties; yet, when a petition has been filed before him, asking a sale on that ground, a court of equity may interfere, at the instance of the defendants, and decree an equitable partition without a sale.

3. *Erection of valuable improvements by tenant in common.*—If one tenant in common of lands erects valuable improvements thereon, with the express authority, or knowledge and implied consent of his co-tenant, a court of equity will, in decreeing partition, give him the benefit of his improvements, by assigning to him that part of the lands on which they are situated; and the claim for such improvements gives a court of equity jurisdiction to enjoin, at his instance, proceedings before the probate judge asking a sale for division.

4. *Rents and profits, for use and occupation, as between tenants in common.*—If one tenant in common use and occupy a portion of the lands, his entry and possession not being hostile to his co-tenant, he is not liable to account for rents and profits; and hence, when asking an equitable partition, and an allowance for the value of improvements erected by him, it is not necessary that he should offer in his bill to pay for his use and occupation.

5. *Partition of lands held in remainder, or of part only.*—In the absence of statutory provisions, partition can not be awarded, either at

[Wilkinson v. Stuart.]

law or in equity, of an estate held in remainder or reversion; nor, as a general rule, will partition be awarded of part only of an entire estate, which would be splitting an entire cause of action; yet, where the lands consist of several distinct tracts, held under the same conveyance, an outstanding life-estate in one tract is no obstacle to a partition of the others.

6. *Appointment of commissioners to make partition.*—In making partition in equity, the usual practice is to issue a commission to disinterested freeholders, giving them proper instructions; and if the parties do not agree upon and nominate persons for appointment, a reference to the register is ordered to ascertain and report the names of suitable persons; but an irregularity in the appointment of commissioners, to which no objection is made before the chancellor, is waived.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 4th December, 1882, by Lewis C. Stuart, against W. W. Wilkinson, praying an equitable division of certain lands, particularly described in the bill, and an injunction of further proceedings in the Probate Court, under a petition filed by said Wilkinson, to have the lands sold, on the ground that they could not be equitably divided without a sale. The lands were bought by the parties at a sale made by the administrator of the estate of W. J. Peavey, deceased, and were conveyed to them by deed dated February 1st, 1873, in which the lands were thus described: "The south-east quarter, and the east half of the south west quarter, and the south-west quarter of the south-west quarter, and the south-west quarter of the north-east quarter, all in section 27, township 8, range 15; also, the north half of section 34; and the east half of the north-west quarter, and west half of the north-east quarter, section 27, township 7, range 14; also, *the reversionary interest of the widow* in the north-west quarter of the north-east quarter of section 5, township 7, range 13; and the north half of the south-east quarter, and north-east quarter of south-west quarter, and north-east quarter of section 28; and west half of south-east quarter, and east half of south-west quarter, section 21, township 7, range 14."

The bill alleged that the lands consisted of "four separate tracts, no two of which are adjacent to each other," namely: 1st, portions of section 27, township 8, range 15, "containing 320 acres of forest land, wholly unimproved;" 2d, the half of section 34, township 7, range 14, "containing 320 acres of forest land, wholly unimproved;" 3d, parts of section 27, township 7, range 14, "containing 160 acres, about 33 of which are improved as hereinafter shown; and, 4th, part of section 5, township 7, range 13, "containing 40 acres, wholly unimproved." The bill alleged, also, that soon after the purchase of the lands, by mutual agreement between the parties, the complainant entered and took possession of the tract containing

[Wilkinson v. Stuart.]

160 acres, cleared about 30 acres, erected valuable improvements to the amount of more than \$500, and occupied it as a homestead up to the filing of his bill; that the defendant was, by the terms of the agreement, to take possession of another part of the land, clear, cultivate, and improve it, but had failed to do so; that the lands can be equitably divided, so as to give the complainant the benefit of the improvements which he has erected, and he has frequently requested the defendant to consent to such partition; that the defendant refused his assent to such partition, and filed his petition in the Probate Court, asking a sale of the lands, and an equal division of the proceeds of sale, on the ground that the lands could not be fairly and equitably divided without a sale.

The defendant answered the bill, admitting the purchase of the lands at administrator's sale, as alleged; denying that the administrator's deed, a copy of which was made an exhibit to the answer, conveyed a fee-simple title to all the lands, and alleging that there was an outstanding life-estate in a portion of the lands, which had been assigned as dower to the widow of said W. J. Peavey; but the description of this particular tract, as the answer is copied in the record, is unintelligible, and is at variance with the description given in the assignment of dower itself as copied in the record. He denied that there was ever any agreement between himself and the complainant as to the use and occupation of portions of the land, or the erection of improvements; alleged that the use and occupation by the complainant was worth more than the value of the improvements which he had erected; alleged, also, that he had paid out about \$200 assessed as taxes on the land, one half of which ought to have been paid by the complainant; and denied that the lands could be fairly and equitably divided without a sale. He demurred to the bill for want of equity, because the complainant did not offer to do equity by accounting for the use and occupation of the lands which he had cultivated; and because it showed that the jurisdiction of the Probate Court had attached, under the petition filed by the defendant, and did not allege any special facts which would show that its jurisdiction was inadequate; and because the complainant had an adequate and complete remedy at law.

On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, on the authority of *Sanders v. Robertson*, 57 Ala. 472, and rendered a decree for a partition of the lands described in the bill, "exclusive of the said widow's dower;" directing the register, within thirty days after the adjournment of the court, to appoint five discreet free-holders as commissioners, whose duty it should be, after being duly sworn, "to enter upon and examine said lands, and divide them into

[Wilkinson v. Stuart.]

two lots, or portions, equal in value as near as possible, having regard to the quality of the land, the fertility of the soil, the convenience and advantages of location, and any other circumstances which may render the same more or less valuable; but, in estimating the value of said lands, all consideration of the value of the improvements made by the complainant shall be excluded, and the value shall be estimated as if no improvements had been made, the improvements being held to be the property of the complainant; and having thus divided the lands into two equal portions, the portion upon which the complainant's improvements are situated shall be set apart and assigned to him, and the other portion to the defendant;" and the commissioners were ordered to report to the next term of the court, or to the chancellor in vacation.

The appeal is sued out by the defendant, who here assigns as error—1st, the failure to decide on the demurrer; 2d, rendering a decree on the merits, which, in effect, overrules the demurrer; 3d, the failure to require the complainant to account for the use and occupation of the lands which he had held and cultivated; 4th, the failure to require him to re-pay one half of the taxes paid by the defendant; 5th, allowing him all his improvements; and, 6th, "in respect to the instructions as to the manner of partition."

J. C. RICHARDSON, and JNO. GAMBLE, for the appellant.—(1.) Courts of law and equity have concurrent jurisdiction of proceedings for the partition of lands.—*Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Wright v. Marsh*, 2 Greene, Iowa, 94; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Howey v. Goings*, 13 Ill. 95; *Castleman v. Veitch*, 3 Rand. 598; *Beeler v. Bullitt*, 13 Amer. Dec. 161; *Hopper v. Fisher*, 2 Head, 253; *Kennedy v. Kennedy*, 43 Penn. St. 413; 33 Vermont, 200; 42 Penn. St. 401. (2.) In cases of concurrent jurisdiction, if the court of law first acquires jurisdiction, a court of equity will not interfere and restrain it, unless special equitable circumstances are shown.—*Smith v. McIver*, 9 Wheaton, 530; *Hines v. Rawson*, 40 Geo. 356; *Nelson v. Dunn*, 15 Ala. 514; *Hause v. Hause*, 57 Ala. 263; 1 Brick. Dig. 630, § 7. (3.) The jurisdiction of the Probate Court, under the petition filed by Wilkinson, can not be doubted (Code, §§ 3497–3513; *Woodruff v. Stewart*, 60 Ala. 206); and that jurisdiction was acquired before this bill was filed. The alleged agreement, under which the complainant claims to have erected his improvements, is denied by the answer, and is not proved; and this agreement, which would have authorized the claim for improvements, is the only matter which gives equity to the bill. (4.) The complainant was chargeable with the value of the use and occupation of the

[Wilkinson v. Stuart.]

land.—*Horton v. Sledge*, 29 Ala. 498; *Hitchcock v. Skinner*, 1 Hoffm. Ch. 21; *Ormond v. Martin*, 37 Ala. 508; *Turner v. Morgan*, 8 Vesey, 165; *Backler v. Farrow*, 2 Hill's Ch. 111; *Carter v. Carter*, 5 Munf. 108; *Dyckman v. Valiente*, 42 N. Y. 549; *McClellan v. Osborne*, 51 Maine, 118; 2 Lead. Cas. Eq. 642. In no event, can he be allowed compensation for his improvements, beyond the rents charged against him (29 Ala. 498; 37 Ala. 606); and the proof shows that the rents equaled, if they did not exceed, the value of the improvements. How, then, can the claim for improvements be a matter of special equity? (5.) If the court had power to decree partition at all, it should have been of all the lands, including the reversionary tract, since equity does not do things by halves.—*Otley v. McAlpine*, 2 Gratt. 340; 2 Lead. Cas. Eq. 647. But partition will not be decreed of an estate in remainder (2 Lead. Cas. Eq. 985); and consequently, partition of the other lands ought not to have been decreed. (6.) The complainant should have been required to re-pay one half of the taxes paid by the defendant, and a lien on the land should have been declared for the amount. (7.) The court erred in directing the register to appoint commissioners to make partition.—2 Dan. Ch. Pr. 1152.

BUELL & LANE, *contra*.—(1.) The complainant had an equitable right to have that part of the land which he had improved set apart to him as part of his share.—1 Washb. Real Prop. 678; *Sanders v. Robertson*, 57 Ala. 465; *Reed v. Reed*, 68 Maine, 568; *Collett v. Henderson*, 80 N. C. 337; 1 Story's Equity, § 656 *b*. This could not be done in the Probate Court. Under the petition as filed, the lands would have been sold, and the proceeds divided equally between the parties; and if the petition could have been amended, so as to authorize a partition by metes and bounds, the division must have been into parts of equal value, and the complainant would have lost one half of the value of his improvements. The powers of the Probate Court, therefore, were inadequate to grant relief, and the jurisdiction of equity was properly invoked. (2.) Partition could not be made of the reversionary interest in the dower lands, during the life of the widow.—1 Washb. Real Prop. 678–9, 681–2, and authorities there cited; 5 Wait's Actions and Defenses, 86, 90–92, 100. The other lands, consisting of four separate and distinct tracts, might be partitioned, without any reference to the dower lands. (3.) The complainant's entry and cultivation of a portion of the lands, if not done under the express assent of the defendant, was not in opposition or hostility to his rights, and was not objected to by him. Under these circumstances, there was no liability for use and occupa-

[Wilkinson v. Stuart.]

tion, or for rents and profits.—*Newbold v. Smart*, 67 Ala. 326. (4.) There is no statute, or rule of practice, as to the manner in which commissioners shall be appointed in such cases as this. By analogy to the practice in the appointment of receivers, the proper course was pursued by the chancellor. The commissioners, no matter how appointed, are the mere agents of the court, and their action is subject to its revision, on objection properly taken.

BRICKELL, C. J.—The partition of lands between joint tenants, tenants in common, and co-parceners, is an established head of equity jurisdiction; and though there may be doubt as to its origin, it is now generally rested on the inadequacy of remedies at law, and the capacity of the court to grant more complete relief, adjusting the equities of the parties, and meeting exigencies or necessities which may be peculiar to the particular case.—1 Story's Eq. §§ 646–50; 2 Lead. Eq. Cases, 894; *Deloney v. Walker*, 9 Port. 497. If the title of the plaintiff is clear, or if it is admitted, the partition is matter of right, not matter of discretion in the court. By statute, it is very common to confer a like jurisdiction upon other tribunals, of superior or inferior jurisdiction. Such statutes, if thereby the equitable jurisdiction is not negatived, are construed simply as affording a cumulative remedy, not as restraining or excluding the equitable jurisdiction.—Freeman on Co-tenancy, § 428. The Code confers on the judge of the Court of Probate a large jurisdiction to order the partition of property, real or personal, held jointly or in common, but declares, in express terms, that a resort to other legal remedies for the partition of lands is not excluded.—Code of 1876, §§ 3497–3513. But it is not to be doubted, that so far as the jurisdiction of the judge of probate is concurrent with that of a court of equity, if he first acquires jurisdiction, it becomes exclusive, and he must continue in its exercise, unrestrained by the interference of the court of equity, unless facts or circumstances of special equitable cognizance are shown to exist, which render inadequate the statutory jurisdiction.—*Waring v. Lewis*, 53 Ala. 615; *Moore v. Leseuer*, 33 Ala. 237; *King v. Smith*, 15 Ala. 270.

2. When the present bill was filed, there was an application pending before the judge of probate, not for a partition of the common estate, but for its sale for distribution, upon the jurisdictional allegation, that an equitable partition could not be made. In addition to the jurisdiction to decree partition, the Code confers on the judge of probate jurisdiction to order a sale of the common estate, upon allegation and proof of the fact that otherwise than by sale an equitable partition or division can not be made.—Code 1876, §§ 3514–20. This juris-

[Wilkinson v. Stuart.]

diction is distinguishable from that which the judge exercises in ordering a partition of the property *in specie*, and, as to the adult tenants, it is exclusive. For, in this State, it is the settled course of decision, that a court of equity can not decree the sale of lands held by adult tenants, without their consent, to effect partition, because the same can not be equitably divided. *Oliver v. Jernigan*, 46 Ala. 41; *Deloney v. Walker*, *supra*. What would be the effect of the pendency of this petition, if it was not shown that the common estate is capable of an equitable partition, and that there are facts and circumstances, of which the judge of probate can not take cognizance, rendering it the duty of the court decreeing partition to order the assignment to the complainant of a particular part of the common estate, it is not necessary to consider. These facts and circumstances justify the intervention of a court of equity that complete justice may be done.

3. The complainant had entered upon a part of the common estate, reduced it from a wild or waste condition to cultivation, and made valuable improvements thereon. His labor and money were expended with the knowledge, and the implied consent, if not the express authorization, of his companion, who had not improved any part of the estate, leaving it, so far as he was concerned, in the condition it was when acquired. Although a tenant making improvements upon the common estate, without the authority of his companion, may not have a remedy to recover their value; yet, upon partition under the decree of a court of equity, the court will so order the division that he may have the benefit of the improvements, by an assignment to him of that portion of the estate on which they are situate. 1 Wash. Real Prop. 582; Freeman on Co-tenancy, § 508; Story's Eq. § 656 b; *Brookfield v. Williams*, 1 Green's Ch. 341; *Pope v. Whitehead*, 68 N. C. 199. In the exercise of the statutory jurisdiction with which he is clothed, the judge of probate could not take cognizance of this equity of the complainant, adjusting the partition so as to meet and satisfy it. A partition by lot is all that he could decree, and he was without power to give the commissioners, appointed to designate and draw the lots, special instructions which may be necessary to adjust the equitable rights of the parties.—*Ward v. Corbitt*, 72 Ala. 438.

4. The bill is not objectionable, because the complainant does not offer to pay for the use and occupation of the part of the lands he had cultivated. His entry and possession was not in hostility or exclusion of his companion, who had an equal right, if he had chosen to exercise it, to enter and occupy. The rule is well settled, that a friendly occupancy of the common estate by one tenant does not render him liable to account for rents

[Wilkinson v. Stuart.]

and profits.—*Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100; *Lockard v. Lockard*, 16 Ala. 433.

5. The parties derive title to the lands held in common, under a conveyance to them jointly. The lands consist of several distinct tracts or parcels, wholly disconnected, separated by varying distances, and do not seem ever to have been occupied as constituting an entire plantation, and are incapable of such occupancy. There is a part of them, in which the parties have only an estate in reversion, and a right to possession will not accrue until the falling in of a life-estate of the widow of a former proprietor, from whom the title is deduced. In the absence of statutory provisions authorizing it, the rule is established, that neither at law, nor in equity, can partition be awarded of an estate in reversion or remainder. 1 Wash. Real Prop. 584; Freeman on Co-tenancy, §§ 440-41; 2 Lead. Cases Eq. 985. It is insisted that, as the court can not decree partition of this part of the lands held in common, there should not be a partition of the other parts, of which there is present title and possession. The general rule, which is invoked, that partition must be made of the entire estate—that it can not be claimed of a part—can not be questioned.—1 Wash. Real Prop. 582; Freeman on Co-tenancy, § 508. The rule is justly applicable, when the common estate consists of a single tenement, or of an entire tract or parcel of land. A partition by parcels might then result, instead of giving either tenant his share in one connected parcel (which is always done when practicable), in compelling him to take in disconnected, disjointed fragments, impairing the value of the whole and all the parts of the common estate. And in any case, when there is, as to the entire estate, a right to immediate partition, the result of entertaining a suit for partition of a part, would be the splitting up of a cause of action, in its nature entire and indivisible. The rule does not seem to us capable of a just application to a case of this character. Title is derived from a single conveyance; and yet the title to the lands of which there is immediate possession is essentially distinct and different from the title to the reversion; as clearly distinguishable as is the title of the tenant of a particular estate, and the title of the remainder-man; and for all legal purposes, and in legal effect, the parties stand in the relation they would occupy, if the several titles had been derived by several instruments, to distinct, different tracts or parcels of land. In such case, the rule invoked could not be applied, and it is not now capable of application, constraining unwilling tenants into the continuance of a relation they are anxious to dissolve, and which may be dissolved as to all the lands they hold by present title, attended with a right of present possession.

[Belmont Coal and Railroad Co. v. Smith.]

6. The usual practice pursued by the court of equity, in making partition, is the issue of a commission to disinterested freeholders, giving them instructions as to the course which they will pursue in assigning the several parts of the lands to be divided. If the parties do not agree upon, and nominate commissioners for the appointment of the court, a reference to the register is ordered to ascertain and report the names of suitable persons to be appointed, and his report is open to the exception of either party. The delegation of authority to the register to appoint the commissioners was irregular, and, if it had been objected to, would have been corrected by the chancellor. It does not appear that the objection was made, and the irregularity was thereby waived. If it should happen that the register appoint others than impartial, discreet commissioners, their report would be open to exception, and all injury apprehended from the irregularity could be obviated.

Let the decree of the chancellor be affirmed.

Belmont Coal and Railroad Company v. Smith.

Action on Promissory Note, by Payee against Maker.

1. *Error without injury, in admission of evidence.*—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy or admissibility was established by evidence subsequently introduced.

2. *Declarations of agent; when admissible against principal.*—The admissions or declarations of an agent, relating to the business of the agency, and made while negotiating in reference to it, are admissible as evidence against his principal.

3. *Thanksgiving day as public holiday.*—Thanksgiving day, though declared a holiday for commercial purposes (Sess. Acts 1882-3, p. 188), is not thereby made *dies non juridicus*, nor is the transaction of judicial business on that day interdicted.

4. *Promissory note for rent; stipulation by payee to save maker harmless against claim of third person.*—Where a promissory note, given for the payment of rent, recites that the payee "agrees to save harmless" the makers against the claim of W., from whom they had also rented the premises, and to whom they had executed a note; if the makers voluntarily pay the claim of W., they can not make the payment available as a defense against the note, without proving affirmatively that defense against it would have been unavailing.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Barton B. Smith, against the
VOL. LXXIV.

[Belmont Coal and Railroad Co. v. Smith.]

appellant, a domestic corporation; was commenced on the 6th February, 1882, and was founded upon a promissory note, dated January 3d, 1881, of which the following is a copy:

"Thirty days from date, we promise to pay B. B. Smith one hundred dollars, as rent of store at Boyd's Switch, for the year 1880; said B. B. Smith agreeing to hold us harmless against claim of James K. Wright.

"BELMONT COAL & R. R. Co.

W. S. GORDON, Vice-president."

The complaint contained two counts; the first on the writing as an ordinary promissory note, and the second setting it out in full, and averring that plaintiff "has at all times, since the execution of said note, been ready and able, and is now ready, able and willing, to hold the said maker harmless against the claim of said James K. Wright." The defendant corporation pleaded payment, want of consideration, failure of consideration, accord and satisfaction, set-off, and a special plea in these words: "For further answer to the complaint, defendant says that, at and before the execution of the writing sued on, defendant had rented said premises and building for the same year for which said instrument was executed to plaintiff, and had executed to said J. K. Wright, their landlord, their promise in writing for the sum of one hundred dollars, the rental of said building for the year covered by said instrument sued on; that said plaintiff, in said instrument sued on, obligated himself to indemnify and hold defendant harmless against the claim of said Wright on said rental contract, and, as one of the means of indemnifying defendant, delivered to said defendant a bond of said Wright, dated December 11th, 1878, and payable at one day, in the sum of \$228.19, on which was then entered a credit of \$100, January 24th, 1879, paid to said plaintiff; and plaintiff assured defendant that said promissory note, or bond, was founded upon a valuable consideration, and that the amount due thereon was the sum aforesaid, and that there was no set-off nor defense valid to the same, and that said maker was solvent therefor, and would accept the same in satisfaction, *pro tanto*, of the said sum due to him from defendant. Defendant relied upon said representations of plaintiff, and had the right to rely on the same; presented said bond to said Wright for payment, or as a set-off to the amount thereof of the debt defendant owed said Wright; and said Wright refused to accept the same as a set-off or payment *pro tanto*, and demanded of defendant, as his landlord, payment of said stipulated sum as rent, and declared his intention to avail himself of defenses to said bond, and, if a recovery was effected thereon, to avail himself of the exemption laws of Alabama; and said Wright had not other property sufficient to respond to said debt, exempt from levy

[Belmont Coal and Railroad Co. v. Smith.]

and sale; and defendant thereupon paid said note to said Wright, before the institution of this suit. Plaintiff had notice of these facts, or the means of notice. Defendant desired and requested plaintiff to relieve defendant of the contract entered into with plaintiff, and offered to surrender said bond, and to place plaintiff in *statu quo*; but plaintiff declined to accept said note and rescind. Defendant here now tenders said bond to plaintiff, and claims a rescission of said contract, or an abatement on the note sued on, and by reason of said failure of consideration, and misrepresentation in the material matters aforesaid, claims a credit on the instrument sued on, to the extent of said bond." There was a demurrer to this special plea, which the court overruled, and the cause was tried on issue joined on all the pleas.

On the trial, as the bill of exceptions shows, the note on which the suit was founded having been read in evidence, the plaintiff himself testified, as a witness in his own behalf, that said note was executed by W. S. Gordon, "who was at the time vice-president of said defendant corporation," and was given for the rent of a store at "Boyd's Switch" for the year 1880; that the store was on land which belonged to the estate of his deceased brother, whose executor he was, and was built by said James K. Wright, under a contract with him, by which it was agreed that Wright should have a lease of the property for three years; that Wright accordingly occupied it for several years, and rented it for the year 1879 to one Isbell, who sub-let it to the defendant: "that while defendant was so in possession, witness notified them that he was entitled to the possession on the 1st January, 1880, and defendant must rent from him; that witness had a contention with said Wright, in 1879, as to who was entitled to receive the rent of said store, plaintiff insisting that his lease to Wright expired at the end of three years, and Wright contending that he was entitled to a lease of the premises for six years; that witness, however, in consideration of the fact that he held said Wright's bond for \$228.19, in which was included \$50 or \$60 for lumber which he had bought of witness, and had used in the erection of said building, consented to give said Wright the benefit of the use of the house for 1879, said Wright transferring to him Isbell's note for \$100, which was credited on said bond; that he was always entirely ready to hold the defendant harmless against the claim of said Wright, and to that end, when defendant's note was executed to him, he delivered to defendant said Wright's bond for \$228.19. Witness then testified, that he was acquainted with one James Barclay, who was a clerk in the defendant's store; and he was then asked this question: "If, in 1879, said Barclay, as such clerk, had an interview with you, with refer-

[Belmont Coal and Railroad Co. v. Smith.]

ence to defendant's renting said store for the year 1880, what did said Barclay say on that occasion?" To this question the defendant objected, because it was not shown that said Barclay was the authorized agent of the defendant to hold said interview; and because defendant could not be bound by the unauthorized statements of said Barclay; and because the evidence sought to be elicited was hearsay, irrelevant, and illegal." The court overruled said objections, and the defendant excepted. "Witness replied, that said Barclay, in 1879, in company with said Wright, did have an interview with him; that Barclay said, in that interview, that he wished to rent said store for the year 1880, for the defendant, from whoever was authorized to rent the same; that he (witness) thereupon consented to allow Wright to appear to be the owner of said property, and the same was rented by said Wright to the defendant for the year 1880; and that he agreed to this arrangement upon the assurance of said Wright that he would obtain a waiver note of W. S. Gordon as vice-president of the defendant corporation, and would turn over said note to him."

J. P. Harris, a witness for plaintiff, testified, "that he was plaintiff's clerk in 1881, and was sent by plaintiff to demand rent of the store for the year 1880, of the defendant, from W. S. Gordon, the vice-president, and to notify defendant not to pay rent for said year to said Wright; and said witness was then asked this question: 'In the course of your interview with said Gordon, did he say anything about the conflicting claims of persons to whom the rent was due?' The defendant objected to this question, because it was illegal, irrelevant, and inadmissible; the court overruled the objection, and the defendant excepted. The witness replied, that Gordon answered, 'Yes—he thought plaintiff was entitled to receive the rent, and he would rather pay it to him; but that Wright had a claim to said rent, and he did not see how defendant could be bound to pay the rent to plaintiff also.'"

Barclay was afterwards introduced as a witness by the defendant, and "testified that, in December, 1879, plaintiff having notified defendant not to rent from Wright, as he (plaintiff) was the only rightful landlord, witness was sent by W. S. Gordon, vice-president of the defendant corporation, to ascertain who was the rightful person to rent said premises, and, finding that Wright asserted rival claims thereto, carried said Wright with him to have an interview with plaintiff; that plaintiff and said Wright, after a short consultation, retired to a back room, and returned after a conference together, when plaintiff said he would give way to Wright, and would allow him to rent the store to defendant for the year 1880, but that said Wright must take a waiver note, and turn it over to him; that said Wright

[Belmont Coal and Railroad Co. v. Smith.]

thereupon furnished witness a blank waiver note, which witness carried to said Gordon, vice-president of said defendant corporation, and told Gordon what plaintiff and Wright had agreed on; and that thereupon said Gordon, vice-president of said corporation, executed said waiver note to Wright, and sent it to him by mail." Wright was also examined as a witness for the defendant, and testified as to the terms of the contract under which he built the house, claiming that he was to have a lease for six years, and as to the agreement between them at the interview mentioned by Barclay; admitting that, by the terms of that agreement, he was to turn over Gordon's waiver note to the plaintiff, but alleging that plaintiff was to give him a written lease according to the stipulations of their original contract; and that he had never delivered the waiver note to plaintiff, because plaintiff had never executed to him such written lease. He further stated, that when he presented his rent note for payment, "witness was shown his said bond which plaintiff had transferred to defendant, and thereupon declared that he would not recognize or pay said bond—that he had valid defenses against it, and it was without consideration, and, if he were sued on it, he would avail himself of the exemption laws; and thereupon said note was paid to witness by said defendant." He testified, also, that he was insolvent at the time these transactions took place.

The court gave the following charges to the jury, on the request of the plaintiff: 1. "It was the duty of the defendant to give the plaintiff an opportunity to hold said defendant harmless against the claim of Wright; and if the defendant voluntarily paid Wright, without notice to the plaintiff, then the defendant can not be heard to say that the plaintiff did not hold it harmless against the claim of said Wright." 2. "The introduction of the note in evidence, together with testimony that plaintiff has been at all times ready and willing to hold defendant harmless against the claim of Wright, makes out a *prima facie* case for plaintiff, and the burden of proof is then shifted to the defendant." The defendant excepted to each of these charges, and then requested the following charges, which were in writing: 1. "If the jury believe from the evidence, that one of the express stipulations of the note sued on was that plaintiff would hold the defendant harmless against the claim of Wright; then, if the jury find from the evidence that said Wright was unable to pay the said obligation for \$228.19, credited with \$100, by reason of insolvency, suit against said Wright was not necessary on the part of the defendant, and the plaintiff is bound to his agreement to hold defendant harmless against the claim of Wright." 2. "The law defines what is the effect of a guaranty. The contract here made by plaintiff, that he

[Belmont Coal and Railroad Co. v. Smith.]

would hold defendant harmless against the claim of Wright, is an absolute guaranty on the part of plaintiff that defendant should not suffer harm or loss on account of said note held by Wright; and if defendant did suffer harm or loss on account of said note held by Wright, then the consideration of the note sued on would fail. This, the court instructs the jury, is the legal construction of said written instrument; and unless the jury find, from the evidence, that the defendant did not suffer harm or loss from the note given to Wright, they are bound to return a verdict for the defendant." 3. "If the jury find that Wright was insolvent, and could have claimed the exemptions on the said bond for \$228.19, then it was not in defendant's power to have enforced the said note or bond as a set-off against their note to said Wright, on such a plea pleaded by Wright to said note; and if they find that said note was dated in December, 1878, then Wright, under the constitution and laws of Alabama, had the right to claim such exemption." The court refused each of these charges, and the defendant duly excepted to their refusal.

The bill of exceptions recites, that the trial of the cause was commenced on Wednesday, 28th November, 1882, and continued until the regular hour for adjournment; that the court then "directed the sheriff to adjourn the court until the regular hour for meeting on the next day, and declined to adjourn over for that day because it was Thanksgiving day by proclamation of the President of the United States, which was admitted;" that the court convened as usual on Thursday morning, and resumed the trial of the cause, which was continued until the court adjourned; and that the trial was finished, and the verdict and judgment were rendered, on Saturday, November 30th. The bill of exceptions does not show that any objection was made, or any exceptions reserved by the defendant, to the action of the court in meeting on Thursday; but it is now assigned as error, that Thursday was *dies non juridicus*, and that the verdict and judgment each is void because of said action of the court. The rulings of the court on the evidence, the charges given, and the refusal of the several charges asked by the defendant, are also assigned as error.

HUMES, GORDON & SHEFFEY, and ROBINSON & BROWN, for appellant.—(1.) Thanksgiving day is a legal holiday, and is not a judicial day.—Sess. Acts 1882-3, p. 188. While ministerial acts may be performed on such day, judicial acts can not be.—3 Chitty's Practice, 106-7; *Lindo v. Musworth*, 2 Cainp. 602; *Gladwin v. Lewis*, 6 Conn. 49, or 16 Amer. Dec. 33; *Reid v. The State*, 53 Ala. 402; *Nabors v. The State*, 6 Ala. 200. (2.) The construction of the writing declared on was a

[Belmont Coal and Railroad Co. v. Smith.]

matter for the court, and it was the duty of the court to declare the legal effect of said writing.—*Collins v. Whigham*, 58 Ala. 438; *Bernstein v. Humes*, 60 Ala. 582; *Shook v. Blount*, 67 Ala. 301; *Goddard v. Foster*, 17 Wallace, 124. (3.) The legal effect of said writing was properly declared in the charges requested and refused.—*Donley v. Camp*, 22 Ala. 659; *Walker v. Forbes*, 31 Ala. 9; *Townsend v. Cowles*, 31 Ala. 428; *Nesbit v. Bradford*, 6 Ala. 746; *Cahuzac v. Samini*, 29 Ala. 288; Brandt on Suretyship and Guaranty, §§ 41, 53, 88–9; *Colgin v. Henley*, 6 Leigh, Va. 86.

W. L. MARTIN, *contra*.—(1.) If the evidence objected to was not competent when admitted, its competency was shown by the evidence subsequently introduced.—1 Brick. Dig. 809, § 86. (2.) Thanksgiving day is made a legal holiday for certain commercial purposes, but secular business on that day is not interdicted.—*Dunlap v. The State*, 9 Texas App. 179, or 35 Amer. Rep. 736; *Richardson v. Goddard*, 23 How. 28. (3.) The writing sued on was properly construed by the court. Whether construed by its own terms alone, or in the light of the attendant circumstances shown by the evidence, the plaintiff could not be held responsible for the defendant's voluntary payment to Wright, made without suit, and without notice to plaintiff.

STONE, J.—The original contract of renting for the year 1880 was made while Gordon was vice-president of the corporation, and Barclay was clerk in the store—used, as we infer, for purposes of the corporation. There was exception to the allowance in evidence of declarations by, and negotiations with both Barclay and Gordon, which were offered and admitted against the objection of the corporation. The declarations and negotiations all related to the contract of renting, and to the rival claims to the rent, asserted by Smith and Wright. The corporation desired the use of the store-house, and Smith and Wright were each willing it should have it. The contention was, whether Smith or Wright should receive the rent.

We consider it unnecessary to decide whether this evidence, at the time it was offered, had been shown to be admissible. Probably it had not.—1 Brick. Dig. 63, §§ 159 *et seq.* Before the testimony was closed, it was shown that Gordon was superintending the business of the corporation, and that Barclay had been authorized by him to negotiate, and obtain a lease of the store. His declarations related directly to the business entrusted to him, and were made pending, and in reference to the negotiation. This clearly legalized the evidence.—1 Brick. Dig. 809, § 86.

[Goodlett v. Kelly.]

There is nothing in the argument that Thanksgiving day is *dies non juridicus*. It was made a legal holiday for commercial purposes.—Sess. Acts, 1882–3, p. 188. This does not indict worldly labor or secular pursuits on that day.

The remaining questions arise on the charges given and refused, and these present for our consideration the interpretation of the guaranty embodied in the note sued on. It is contended for appellant the guaranty is an original, independent obligation, casting on the coal and railroad company no duty whatever, in reference to the defense of Wright's claim. We do not so interpret the language employed. It resembles a covenant of good title in a deed of conveyance. The grantee in such deed can not yield voluntarily to an adversary claim, without taking upon himself the duty and burden of showing that such adversary claim is paramount to that of his grantor. In the present case, it was clearly contemplated that there should be a trial and test of the validity of the set-off, transferred by Smith to the coal and railroad company. Smith had the unquestioned right to have this question tried, unless it is affirmatively shown the defense would have been unavailing. Brandt on Sur. and Guar. §§ 84–6. If, by the terms of the contract, the ownership of Wright's bond passed to the corporation (it is not shown it did not), then the fact that Wright claimed the rent-money as exempt to him under the statute, would have been no answer to the plea of set-off. The rule is different, when one judgment is sought to be set off against another.—Thompson on Homestead, §§ 892 *et seq.*

The charges given are in harmony with these views, while those refused are not.

This is apparently a hardship on the corporation, but it was brought on it by the terms of its own contract, and by its voluntary payment of the Wright claim.

Affirmed.

Goodlett v. Kelly.

Bill in Equity by Purchaser, for Specific Performance.

1. *Competency of purchaser as witness, against heirs of deceased vendor.* In a suit for the specific performance of a contract, instituted by the purchaser against the heirs of the deceased vendor, the complainant can not testify as a witness in his own behalf (Code, § 3058), as to the terms of the contract between himself and the deceased vendor.

2. *Waiver of objection to such incompetency.*—The parties in adverse

[Goodlett v. Kelly.]

interest, in such case, may waive all objection to the competency of the plaintiff's testimony; but the objection is not waived by merely filing cross-interrogatories, after first objecting to his competency.

3. *Retroactive laws changing rules of evidence.*—Laws affecting the admissibility or competency of evidence, in civil cases, pertain only to the remedy; and there is no constitutional provision, State or Federal, which takes away or limits the discretionary power of the General Assembly, in enacting or changing such laws, to make them applicable to pending actions, or existing causes of action.

4. *Specific performance; when refused.*—A court of equity will not decree the specific performance of a contract, when the allegations of the bill are not established by clear and definite proof, or where the evidence is left in doubt and uncertainty.

5. *Testimony of deceased witness.*—The testimony of a witness since deceased, given on the trial of a former suit, is admissible as evidence in a subsequent suit between the same parties, or their privies, respecting the title to the same property.

6. *Proof of delivery of deed.*—The possession of a deed by the grantee, unexplained, or un rebutted, may be *prima facie* sufficient proof of its delivery; but, when the grantee is the widow of the grantor, and it is shown by her testimony, taken in another suit, in which the deed was offered in evidence, that she found it among her husband's papers after his death, it being then unattested, and the signature of the only attesting witness being afterwards affixed at her request,—this is not sufficient to establish the deed, as in favor of a subsequent purchaser, seeking to enforce it against her heirs.

7. *Dismissal of bill in vacation.*—A decree rendered in vacation, dismissing a bill on demurrer, or, perhaps, on motion to dismiss for want of equity, without affording the complainant an opportunity to amend, is erroneous; but this rule does not apply to a dismissal on final hearing on pleadings and proof, where the substantial defects of the proof can not be remedied by amendment.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on 30th September, 1879, by David C. Goodlett, against John W. Hansell and others, children and heirs of John H. Hansell and Carrie R. Hansell, both deceased, and against one Terence Kelly; and sought the specific execution of a contract for a sale or exchange of lots, alleged to have been made between the complainant and Mrs. Hansell, on or about the 29th June, 1873. At the time this contract was made, the complainant was in possession of a house and lot in Decatur, which he had bought from one H. M. Minor, having paid a part of the purchase-money, and received a bond conditioned to make title on payment of the balance due, which was about \$500; and Mrs. Hansell was in possession of a house and lot in the town of Moulton, containing about eighteen or twenty acres, which she claimed under a deed from her said husband, then deceased, dated January 3d, 1867. This deed, a copy of which was made an exhibit to the bill, recited, as its consideration; "an indebtedness in a considerable sum, not ascertained, for the appropriation by me [grantor] of her separate property derived from her father," natural love and affection, and one

[Goodlett v. Kelly.]

dollar in hand paid; and it purported to be attested by J. S. Clark, as a subscribing witness. The terms of the contract for the exchange of the lots, as alleged in the bill, were these: "Orator agreed to give her, Mrs. Hansell, possession and control of all his title and interest in and to said Decatur lot, and to abandon and turn over to her all his right accruing under said contract of sale to him by said Minor, for and on account of the payment of the purchase-money of said lot, before that time by him made, which amounted to a considerable sum, to-wit, the sum of \$778, or thereabouts; and Mrs. Hansell agreed to surrender to complainant possession of said Moulton lot, and to make and deliver to him a deed of conveyance of all her title, right and interest in said lot." The bill alleged, also, that the parties, on the consummation of this contract, respectively delivered and received possession of the lots agreed to be exchanged; that Mrs. Hansell continued in the peaceable possession of the Decatur lot, until, having failed to pay the balance of the purchase-money due to Minor, she abandoned the possession, or was compelled to surrender it to him; and that the complainant continued in the possession of the Moulton lot, until he was dispossessed, after the death of Mrs. Hansell, under a recovery in an action of ejectment brought against him by the children and heirs of said John H. and Carrie H. Hansell. In that action, the defendant (now complainant) relied on his deed from Mrs. Hansell, and her deed from her husband; and his defense failed on the proof as to the execution and delivery of said latter deed.—*Goodlett v. Hansell*, 56 Ala. 346. The present bill was filed more than two years after the decision of that case by this court; and in the meantime, in November, 1877, the Hansell children had sold and conveyed said Moulton lot to Terence Kelly, at the price of \$600, Mrs. Hansell joining in the deed with her children.

The special chancellor, before whom the cause was first heard, sustained a demurrer to the bill for want of equity; but his decree was reversed by this court on appeal, and the cause was remanded.—*Goodlett v. Hansell*, 66 Ala. 151. After the remandment of the cause, Kelly filed an answer, asserting title under his purchase from the heirs of Hansell, Mrs. Hansell joining in the deed, as he alleged, for the purpose of conveying her dower interest in the land; and claiming that complainant's legal rights were decided adversely to him in the action at law, and that he (respondent) was entitled to protection as an innocent purchaser for value against the equitable rights asserted by the bill. The other defendants adopted the answer of Kelly. The complainant's deposition was taken in his own behalf, and he testified to the terms of the contract of exchange between himself and Mrs. Hansell, as alleged in the bill; but the chan-

[Goodlett v. Kelly.]

cellor sustained the defendant's objections to this evidence, and suppressed it. The complainant also took the deposition of D. D. Goodlett, his son, who testified, that he was present and heard the contract made for the exchange of lots, being then thirteen years old; and he stated that, by the terms of the contract as agreed on, Mrs. Hansell "was to take the Decatur lot for the Moulton lot, and pay Mr. Walden [Minor's agent] five hundred dollars difference." The cause being submitted for final hearing on pleadings and proof, the chancellor rendered a decree in vacation, dismissing the bill, but without prejudice; holding that, after the suppression of the complainant's own testimony, he had failed to establish his case, as there was a variance between the contract alleged in the bill and that proved by the testimony of D. D. Goodlett.

The complainant appeals from this decree, and here assigns as error, 1st, the rulings of the chancellor on the evidence; 2d, the dismissal of the bill in vacation, without giving him an opportunity to amend his bill; and, 3d, the final decree rendered.

WM. COOPER, THOS. M. PETERS, and J. WHEELER, for appellant.—(1.) The substantial merits of this case were decided in favor of the complainant on the former appeal (*Goodlett v. Hansell*, 66 Ala. 151), and it only remained for him to prove his case as alleged. The contract is proved, substantially as alleged, and is fair, just, and reasonable in all its parts; the complainant's only remedy is a specific performance of the contract, and he is entitled to it as matter of right.—*Gould v. Womack*, 2 Ala. 83; *Casey v. Holmes*, 10 Ala. 776; *Pratt v. Lyon*, 4 Porter, 314; *Pratt v. Lane*, 9 Cranch, 491; 1 Johns. Ch. 131; *Brewer v. Brewer & Logan*, 19 Ala. 481; 1 Story's Equity, § 759. (2.) Although Hansell's deed to his wife may not have been perfected by delivery, she had a perfect equity in and to the lands conveyed, and this she transferred to the complainant.—*Felder v. Harper*, 12 Ala. 612; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Wilson v. Sheppard*, 28 Ala., 623; *Marks v. Cowles*, 53 Ala. 499; *Davidson v. Lanier*, 51 Ala. 318; *Copeland v. Kehoe*, 57 Ala. 246; *Northington v. Faber*, 52 Ala. 47. (3.) Kelly was a purchaser with full notice, actual and constructive, of the complainant's rights and equities, and he occupies no better or higher position than his vendors. *Horton v. Sledge*, 29 Ala. 478; *Gunn v. Brantly*, 21 Ala. 646; *Goodwin v. Lyon*, 4 Porter, 316; *Collins v. Whigham*, 58 Ala. 834; 3 Bland, 453; 1 Story's Equity, §§ 396–7; Sugden on Vendors, ch. 11, § 5; 2 Hill's Ch. 426; 5 Howard, 279. (4.) The complainant was a competent witness to testify to the terms of the contract between himself and Mrs. Hansell. Her estate

[Goodlett v. Kelly.]

was not interested, and her administrator was not a party to the suit. Kelly claims through the heirs of John H. Hansell, who claim through their father; and he alleges, in his answer, that Mrs. Hansell had only a dower interest in the lands.—Gresley's Ev. 236-38; *McGehee v. Lehman, Durr & Co.*, 66 Ala. 316; *Toney v. Moore*, 4 St. & P. 347; *McCurry v. Hooper*, 12 Ala. 823; 17 Howard, 239, 274; 21 Ala. 504. The Hansell children have conveyed their interest in the land, but without covenants of warranty, to Kelly, who is the only defendant really interested; and they can neither be benefited nor injured by the result of this suit, nor can the estate of their mother be affected in any way. (5.) The complainant was certainly a competent witness, as to these matters, when the cause of action accrued; and if the present statute renders him incompetent (Code, § 3058), its provisions can not be applied to this case. The means of enforcing a contract are a part of the contract itself, or pertain to the rights springing out of it; and the evidence competent or necessary to establish it when made are an essential part of the means to enforce it, which the legislature can not destroy or impair.—*VanHoffman v. Quincy*, 4 Wallace, 535; *Bronson v. Kinzie*, 1 Howard, 311; *Steamboat Farmer v. McCraw*, 31 Ala. 659. (6.) The objection to the complainant's competency was waived by filing cross-interrogatories, which called for new matter beyond and outside of the direct interrogatories; and having made him their witness as to these matters, the defendants can not exclude or suppress the testimony.—Gresley's Ev. 61; 1 Phil. Ev. 436-7; 1 Stark. Ev. 34; *Woodcock v. Bennett*, 1 Cowen, 742; 1 John. Ch. 62; 10 John. 542; *Field v. Holland*, 6 Cranch, 24. (7.) The complainant's case is established, substantially as alleged, by the testimony of D. D. Goodlett, without the aid of the complainant's own testimony. That there is no material variance between the testimony of this witness and the allegations of the bill, as to the terms of the contract, see *Harrison v. Weaver*, 2 Porter, 542; *Hair v. Little*, 28 Ala. 236; *Montgomery v. Givhan*, 24 Ala. 568; *Lanier v. Hill*, 25 Ala. 554; *Locke v. Palmer*, 26 Ala. 312. (8.) If there was such a variance, then the bill ought not to have been dismissed in vacation, without giving the complainant an opportunity to amend.—*Bishop v. Wood*, 59 Ala. 253; *Kingsbury v. Milner*, 69 Ala. 502.

W. P. CHITWOOD, and H. A. SHARPE, *contra*.—(1.) As to the terms of the contract between himself and Mrs. Hansell, the complainant was not a competent witness in this suit, being disqualified by the express provisions of the statute.—Code, § 3058; *Ala. Gold Life Ins. Co. v. Sledge*, 62 Ala. 568; *Waldman v. Crommelin*, 46 Ala. 580; *Stuckey v. Bellah*,

[Goodlett v. Kelly.]

41 Ala. 705; *Lewis v. Easton*, 50 Ala. 471; *Boykin v. Smith*, 65 Ala. 299; *McCrary v. Rash*, 60 Ala. 374; *Keel v. Larkin*, 72 Ala. 493. (2.) So far as affects this case, the new statute and the old are substantially the same; and if there be any material difference, the legislature had the power to make, as it has made, the new law operative on existing causes of action. Cooley's Const. Lim. 208. (3.) Leaving the complainant's own testimony out of consideration, his case fails on the proof, the other evidence leaving it in great doubt and uncertainty. *Aday v. Echols*, 18 Ala. 353; *Goodwin v. Lyon*, 4 Porter, 297; *Danforth v. Laney*, 28 Ala. 274; *Blackwilder v. Loveless*, 21 Ala. 371; 1 Brick. Dig. 692, § 768. (4) The complainant's case failing on the proof, the most he could ask was a dismissal of his bill without prejudice, which the chancellor granted. *Carver v. Eads*, 65 Ala. 190.

SOMERVILLE, J.—The complainant, Goodlett, is clearly not a competent witness, in the present suit, as to the trade or exchange of lands alleged to have taken place between himself and Mrs. Hansell during her life-time. He is excluded by the provisions of section 3058 of the Code of 1876, as it has been repeatedly construed by the past decisions of this court. This land trade, for the specific performance of which the bill is filed, was a *transaction* with the deceased, involving many *statements* made by her as to its terms and conditions. If the suit were one directly against the estate of Mrs. Hansell, the complainant's testimony would be excluded by the very letter of the statute.—Code, § 3058. It would be prejudicial to the rights of the decedent, whose estate might be liable to diminution by reason of it.—*Ala. Gold Life Ins. Co. v. Sledge*, 62 Ala. 566. The statute has been uniformly construed to embrace many cases, within its spirit and purpose, which do not fall within its letter. *Beneficiaries*, who are not directly parties of record, have been held to be excluded for incompetency.—*Drew v. Simmons*, 58 Ala. 463; *McCrary v. Rash*, 60 Ala. 374; *Keel v. Larkin*, 72 Ala. 493. In a suit by a transferee, the *transferor*, though not a party to the action, has been excluded.—*Lewis' Adm'r v. Easton*, 50 Ala. 470. And, generally, the statute is construed to protect, not only the estate of a decedent, where the purpose or result of the evidence would be to diminish it, but also the *rights of heirs, or others, who claim in succession under the decedent*.—*Boykin v. Smith*, 65 Ala. 294; *Key v. Jones*, 52 Ala. 238.

2. It is very true, as insisted, that the defendants, or adversary parties, had a right to waive the objection to the complainant's testimony based on his incompetency, the statute being for the protection of estates, and those claiming in suc-

[Goodlett v. Kelly.]

cession or privity.—*Dudley v. Steele*, 71 Ala. 423. But the mere cross-examination of the complainant, coupled with a timely objection to his competency previously interposed, would not constitute such a waiver. The uniform practice is to first object to the competency of the witness, either in whole or part, and then proceed to cross-examine. Any other course would lead to intolerable delays in the administration of justice.

3. It is argued by appellant's counsel, that in as much as the complainant was a competent witness to establish his title, under the statute existing at the time of his alleged contract in 1873, under the provisions of section 2704 of the Revised Code of 1867, the General Assembly had no constitutional power to deprive him of the right by changing the rule of evidence, as was done by the act of March 2, 1875, now embodied in section 3058 of the present Code, which we have attempted to construe above. Without committing ourselves to the view, that there is any material difference in the meaning of the two statutes, so far as concerns the question under discussion, it is manifest that the argument is without force. While retroactive *criminal* legislation is prohibited by both the Federal and State constitutions, under the designation of *ex-post-facto* laws, and therefore, any change in the laws of evidence, rendering a criminal conviction more easy than it was when the crime was committed, would be offensive to constitutional provisions; the rule is otherwise as to changes in the rules of evidence in *civil* cases. These pertain to the remedy, and form no part of the obligation of an existing contract. It is a plain proposition, free from all doubt, that no one possesses a vested right to existing rules of evidence, in civil causes of action, and the law-making power are at liberty to change them, from time to time, within the broad latitude of their sound discretion.—Cooley's Const. Lim. 208; Sedgw. Const. & St. Law, 689, 691.

4. We have examined the testimony of the various witnesses in this case, with great care; and there is much in the record which strongly inclines us against reversing the decree of the chancellor, refusing specific performance of the contract sought to be enforced by complainant. Leaving out of view the vast deal of illegal evidence, which the chancellor has properly refused to consider, there is one point upon which we prefer to place our affirmance of his decree. We are not satisfied from the evidence that Mrs. Hansell, through whom the complainant claims title, had any interest, legal or equitable, in the "Moulton lot," the conveyance of which by the defendants is sought to be compelled by specific performance in this suit. The rule prevails, that if the allegations of the bill are not established by clear and definite proof, or if the evidence is left in doubt and uncertainty, the court will refuse to decree specific per-

[Goodlett v. Kelly.]

formance.—*Aday v. Echols*, 18 Ala. 353; *Ellis v. Burden*, 1 Ala. 458.

5-6. In our judgment, it is left in great uncertainty and doubt, whether or not the deed, under which Mrs. Hansell claimed this property by conveyance from her husband, bearing date the 3d day of January, 1867, *was ever delivered to her by him*, so as to operate as a deed. The only attesting witness to the instrument was James S. Clark, who testifies that his own signature, or attest, was placed to it after the death of the grantor, and on the request of the grantee. Neither he, nor any other person, proves its delivery. The only evidence of such delivery consists in its possession by Mrs. Hansell, who is shown to have claimed the property under it. This, if un rebutted, might *prima facie* be sufficient. It is sought to overcome this presumption of delivery by introducing the testimony of Mrs. Hansell herself, given during her life, in a certain suit at law involving the title to this same property, in which the present defendants, excepting alone Kelly, were plaintiffs, and David C. Goodlett, the present complainant, was defendant in ejectment. Mrs. Hansell, being now deceased, her testimony in the former suit is admissible in the present suit, without any question. The subject of controversy in the two suits is the same, involving the title to the same tract of realty, and the parties are the same, excepting only one, who claims title through privity with the plaintiffs in the former suit. This brings the case within the rule.—*Long v. Davis*, 18 Ala. 801; *Clealand v. Huey*, *Ib.* 343; 1 Greenl. Ev. 163; 2 Best Ev. § 496; *Marler v. The State*, 67 Ala. 55. There is some controversy, as to what Mrs. Hansell swore on the former trial, as to how she came in possession of the deed; but the evidence on the subject is not conflicting, or irreconcilable. We feel no hesitation in believing that her statement was, that she found the deed among the papers of her husband, *after his decease*. This seems probable in view of the imperfection of the instrument for want of acknowledgment by the grantor, or attestation by any witness. The husband of the alleged grantee, being a lawyer by profession, would not probably be ignorant of this plain requisite to the validity of a deed, which is a matter of common learning, and would not, therefore, have been likely to deliver it in its imperfect state. If the deed in controversy was never delivered by Hansell to his wife, she, of course, acquired no title to the property, and could herself confer none.

In this view of the case, there is a fatal defect in the proof, and a consequent variance between *allegata* and *probata*, which do not correspond. The complainant has failed to establish a necessary averment of his bill, without which he must also necessarily fail to recover.

[Bailey, Davis & Co. v. Timberlake.]

There are other grounds, perhaps, upon which we might safely place our affirmance of the chancellor's decree, but these we do not propose to consider.

7. It is suggested that the decree is erroneous, because the dismissal of the bill was in *vacation*, and not in term time. This would be true, if the judgment of the court had been on demurrer to the bill (or, perhaps, on motion to dismiss the bill for want of equity), as in the cases of *Kingsbury v. Milner*, 69 Ala. 502, and other cases in which we have followed that ruling. But no amendment of the pleadings can supplement the failure of the proof, and the case is not one whose defects can be cured by amendment.

Affirmed.

Bailey, Davis & Co. v. Timberlake.

Bill in Equity for Reformation of Mortgage, Redemption, Account, and Foreclosure.

1. *Reformation of mortgage as against subsequent judgment creditors.* The statutes of registration, for the protection of judgment creditors against unrecorded conveyances (Code, §§ 2166-7), relate only to conveyances of the legal estate in lands, and have no application to mere equitable estates or interests, which are not subject to the lien of executions or judgments, and are not within the policy of the statutes; and there is nothing in the statutes which, as in favor of judgment creditors, forbids the reformation of a recorded mortgage by a court of equity, so as to make it include lands which were omitted by mistake.

2. *Protection to bona fide purchaser without notice.*—A *bona fide* purchaser for valuable consideration is entitled to protection against all latent equities of which he had no notice, whether he purchased under contract with the holder of the legal title, or at a sale under execution against him; but, whether a judgment creditor, purchasing at a sale under his own execution, and paying the price bid by entering satisfaction of his judgment, is entitled to protection as a *bona fide* purchaser for valuable consideration, is a question as to which there is some conflict of authority, and which does not arise in this case, the sale under execution being a nullity.

3. *Foreclosure of mortgage, by sale under power; statutory right of redemption.*—A sale of lands under a power contained in a mortgage, or deed of trust for the benefit of a creditor, cuts off the mortgagor's equity of redemption as effectually as a decree of strict foreclosure, and leaves nothing in him but the statutory right or privilege of redemption (Code, §§ 2877-80), which is not subject to levy and sale under execution at law.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 25th September, 1883,

[Bailey, Davis & Co. v. Timberlake.]

by J. P. and J. S. Timberlake, as the administrators of the estate of Henry Bunn, deceased, against John P. Bynum and wife, and against the persons composing the partnership of Bailey, Davis & Co., a mercantile firm doing business in Nashville, Tennessee; and sought, 1st, the reformation of a mortgage, executed to the complainants by said Bynum and wife, by correcting an erroneous description of the lands conveyed; 2d, a redemption of the property from said Bailey, Davis & Co., who were judgment creditors of said Bynum, had bought the property at a sale under execution on their own judgment, and had afterwards redeemed from one Marcellus Townsend, the purchaser at a sale made by W. H. Robinson, as trustee, under a deed of trust executed to him by said Bynum and wife; and, 3d, an account and foreclosure of the complainants' mortgage. The complainants' mortgage was dated March 15th, 1880, and was duly recorded; and it purported to convey, with other lands, three lots in the town of Scottsboro, described as lots 138, 139, 140; but the bill alleged that these numbers were inserted by mistake, and that the lots intended to be conveyed were Nos. 133, 134, and 135. The deed to Robinson, as trustee, to secure a debt due to one Daniel Townsend, was dated July 24th, 1875, and conveyed the same property, by the same erroneous description. The debt to Townsend not being paid at maturity, Robinson sold the property, on the 20th April, 1881, under the provisions of the deed; and Marcellus Townsend became the purchaser at the sale. Bailey, Davis & Co. recovered a judgment against Bynum, on the 2d June, 1881; an execution on their judgment was levied on the lots numbered 133, 134, and 135, and on the other lands conveyed by said mortgage and deed of trust; and at the sale under this levy, in September, 1881, they became the purchasers, for an amount much less than their judgment, and received the sheriff's deed. On the 4th January, 1882, Bailey, Davis & Co. redeemed from Townsend, the purchaser at the sale made by Robinson, and, as the bill alleged, they refused to allow the complainants to redeem from them, under an offer and tender made in conformity to the requisitions of the statute. On these facts, as alleged in the bill, the complainants prayed a reformation of their mortgage, a redemption as junior mortgagees from Bailey, Davis & Co., an account and foreclosure of their mortgage, and general relief. A demurrer to the bill was filed by Bailey, Davis & Co., assigning specially seven causes or grounds of demurrer, which demurrer the chancellor overruled; and they here assign his decree as error.

ROBINSON & BROWN, for appellants.—The registration statutes are intended for the protection of subsequent judgment cred-

[Bailey, Davis & Co. v. Timberlake.]

itors, and of innocent purchasers, and should receive a liberal construction in their favor. Conveyances are required to be recorded "word for word;" the registration is made constructive notice, and equivalent to actual notice of their contents; and the parties are protected against negligence or mistake on the part of the recording officer. Beyond this the statutes do not go, and third persons have a right to claim their protection, when not chargeable with actual notice or negligence. These appellants are not charged by the bill with actual notice, and the record does not charge them with constructive notice. They have acquired the legal title by the sheriff's deed, and they have an equity at least equal to the complainants. As judgment creditors, they are entitled to protection against the complainants' asserted equity. The subsequent acknowledgment of a defective conveyance will not be allowed to relate back, to the prejudice of creditors (*Hendon v. White*, 52 Ala.); nor should a correction of any other mistake or omission be allowed any greater effect.—*Pollard v. Cocke*, 19 Ala. 188; *Daniel v. Sorrells*, 9 Ala. 446. The appellants are not only judgment creditors, but purchasers at execution sale, and in that character they are entitled to claim protection against an unrecorded mortgage, or any latent equity of which they had no notice.—*Fash v. Ravishes*, 32 Ala. 451; *Dudley v. Abner*, 52 Ala. 581; *Barker v. Bell*, 37 Ala. 354; *Turner v. Kelly*, 70 Ala. 85.

NORWOOD & NORWOOD, *contra*.—On the facts alleged in the bill, the complainants have a clear right to a reformation of their mortgage as against Bynum and wife, and also against Bailey, Davis & Co., unless the latter can claim protection against this equity. As purchasers at the execution sale, the appellants acquired nothing, since the judgment debtor then had no interest subject to sale under execution; and as purchasers at their own sale, for less than the amount due on their judgment, they have parted with nothing, and can not be regarded as purchasers for valuable consideration.—*Dickerson v. Tillinghurst*, 25 Amer. Dec. 528; *Wainwright v. Flanders*, 8 Cent. Law Journal, 39; *Early & Lane v. Owens*, 68 Ala. 180; *Stone v. Hale*, 17 Ala. 557; 40 Geo. 535. The statutes of registration, as in favor of judgment creditors, relate only to conveyances of the legal estate, and can not be applied to equitable rights or interests.

BRICKELL, C. J.—The demurrer of appellants, Bailey, Davis & Co., to the original bill, assigns two separate and distinct causes, though stated in varying form and terms. The first is, that as they are not averred to have had notice of the erroneous description or designation of a part of the lands em-

[Bailey, Davis & Co. v. Timberlake.]

braced in the mortgage to the appellees, as judgment creditors of the mortgagor, they are protected by the statute of registration against a reformation or correction of the description, so as to apply the mortgage to the lands really intended to be conveyed. The second is, that, if not entitled to protection as judgment creditors, they are as purchasers under the execution sale and the conveyance made to them by the sheriff.

1. The statutes of registration relate only to conveyances of the legal estate in lands,—not to equitable interests, often incapable of registration, and to which it is not practicable to apply the policy pervading the statutes. Such equities or interests are not subject to the lien of judgments or executions at law, and there can be no reason for declaring them unavailing as to the judgment creditor, who has not, and can not acquire, a lien upon them for the satisfaction of his judgment—*Falkner v. Leith*, 12 Ala. 165; *Fash v. Ravisies*, 32 Ala. 451; *Donald v. Hewitt*, 33 Ala. 534; 2 Lead. Cas. Eq., Part I, 226. Against outstanding and prior conveyances of the legal estate, not recorded as the statutes require, and of which he is without notice, protection is afforded him, because, by the issue and delivery of execution to the sheriff, a lien is acquired, which it is the policy of the statute to preserve, entitling it to precedence as a reward of diligence, and to discourage dormant conveyances. The lien is, however, subordinate to all the equities, not tainted with fraud, binding on the legal estate, which could have been maintained and enforced against the judgment debtor.—2 Lead. Cas. Eq., Part I, 89. There is no more frequent application of this principle, than to suits in equity for the reformation of defective conveyances of lands, or of other instruments of which registration is necessary. The court intervenes, and enforces the equity against all others than a *bona fide* purchaser for a valuable consideration without notice. In this relation a judgment creditor does not stand; he is not a purchaser; has not a *jus in re*, nor a *jus ad rem*. All he has acquired, or can acquire, is a mere general, inchoate lien upon the lands or estate of his debtor subject to execution; and a court of equity will not suffer the lien to be so employed, that property which, in equity and good conscience, belongs to another than the debtor, shall be taken and applied to the satisfaction of the judgment. 1 Story's Equity, § 165; *Ib.* § 1502; *Hale v. Stone*, 17 Ala. 557; *Whitehead v. Brown*, 18 Ala. 652; *Larkins v. Biddle*, 21 Ala. 252; *Early v. Owens*, 68 Ala. 171.

2. While the lien of a judgment, or, under our statutes, the lien of an execution, is limited and confined to the estate of the debtor, not cutting off equities capable of enforcement against him, the rule does not apply to a purchaser for valuable consideration, without notice, at a sale under the execution and

[Bailey, Davis & Co. v. Timberlake.]

judgment. The right of a *bona fide* purchaser to protection against latent equities, of which he has no notice, is generally regarded as the same, whether the purchase is by contract with the holder of the legal estate, or at a forced sale, the act of the law.—*Ohio Life Ins. & Tr. Co. v. Ledyard*, 8 Ala. 866; *Fash v. Ravisies*, 32 Ala. 451; 2 Lead. Cas. Eq., Pt. I, 93 *et seq.* There is some conflict of authority, whether the judgment creditor, if he becomes the purchaser, and pays the purchase-money by the mere satisfaction of his judgment, in whole or in part, is entitled to stand in the relation of a *bona fide* purchaser.—2 Lead. Cas. Eq., Pt. I, 94; Freeman on Executions, § 336; *Ohio Life Ins. & Tr. Co. v. Ledyard*, *supra*; *Fash v. Ravisies*, *supra*; *Saffold v. Wade*, 51 Ala. 214. Upon that question it is not now necessary to enter into a discussion, or express an opinion; for it is apparent that the sale by the sheriff was a nullity,—the judgment debtor, at the time of the levy and sale, not having an estate or interest in the lands which was subject to the execution.

3. The deed of trust to Robinson, for the security of the debt to Townsend, was older than the mortgage to the appellees, and older than the judgment under which the sheriff made the sale. Before the rendition of the judgment, Robinson, the trustee, in execution of the power with which the deed clothed him, made sale of the lands; Marcellus Townsend, from whom Bailey, Davis & Co. redeemed, becoming the purchaser. The sale as effectually cut off and barred the equity of redemption,—the only estate or interest in the lands residing in the judgment debtor,—as a decree of strict foreclosure would have done. The legal and equitable estates were by the sale united in the purchaser, and all that remained to the judgment debtor was the statutory right or privilege of redemption, which is not property, but a mere matter of jurisdiction, and is not the subject of sale under execution at law.—*Childress v. Monette*, 54 Ala. 317. The right of the judgment debtor was the mere privilege of re-purchasing the lands upon the terms prescribed in the statute; a right which does not arise until after a sale under the decree of a court of chancery, or under execution at law, or in the execution of a power in a mortgage or deed of trust; and it is forfeited, if there is not an exercise of it in the precise mode prescribed by the statute.—*Spoor v. Phillips*, 27 Ala. 193; *Paulling v. Meade*, 23 Ala. 505; *Sanford v. Ochlatomi*, *Ib.* 609. So far from the statutes contemplating that the right or privilege shall be subject to levy and sale under execution, they confer upon judgment creditors a distinct, independent right of redemption, which can not be impaired or forfeited by acts of the debtor, which would operate a destruction or forfeiture of his rights.—*Trimble v. Williamson*, 49 Ala. 525. The ex-

[The State, ex rel. Stow v. City Council of Montgomery.]

ecution sale passed no interest in the lands, and by it the purchaser acquired no right which any court, either of law or equity, will notice and protect.

As junior mortgagees, having acquired, before the sale by the trustee, the equity of redemption of the mortgagor, the appelles were entitled to redeem from the purchaser at the sale made by the trustee, Robinson. A mortgagee has the statutory right of redemption, whether a sale of the lands subject to the mortgage has been made under execution at law, or under a prior mortgage or deed of trust.—Freeman on Executions, § 317. They have an equal right to redeem from a junior judgment creditor who has redeemed from a purchaser, under the terms prescribed in the statute.

The demurrers were not well taken, and the decree overruling them must be affirmed.

The State, *ex rel.* Stow v. City Council of Montgomery.

Bill in Equity, for Injunction against Municipal Tax.

1. *Municipal bonds in aid of railroad; injunction of tax to pay interest on.*—The corporate authorities of the city of Montgomery having been authorized, by special statute, to submit to a vote of the citizens the question of granting aid to the South and North Alabama Railroad Company, on the terms agreed on between the said corporate authorities and the directors of the railroad company, and to issue city bonds in aid of the railroad, if the election resulted in favor of subscription; the issue and negotiation of the city bonds might be enjoined, at the suit of individual citizens and tax-payers, on the grounds that a majority of those voting at the election did not in fact vote in favor of subscription, and that the propositions voted on were afterwards changed, to the detriment of the city, by agreement between the city authorities and the railroad directors, “if these facts had been shown at the proper time;” but, the bonds having been issued, being regular on their face, negotiable in form, and having passed into the hands of third persons, as purchasers for value, who are not charged with knowledge or notice of any irregularity in their issue, as against them such irregularities avail nothing, and the tax-payers can not enjoin the collection of a municipal tax levied to pay the interest on them.

2. *Burden of proof as to notice.*—As against the holders of negotiable municipal bonds, an averment of notice of irregularities in their issue which would invalidate them, though necessary in a bill which seeks to enjoin their collection, is negative in its character, and does not impose on the complainants the *onus* of proving notice.

3. *Special statute authorizing city of Montgomery, on vote of citizens, to aid in construction of South and North Alabama railroad; certificate of managers, as to result of election; difference between propositions voted on*

[The State, ex rel. Stow v. City Council of Montgomery.]

and those afterwards accepted; levy of tax on real estate only.—As to the construction of the act approved December 7th, 1866, entitled “An act to authorize the city of Montgomery to aid in building and equipping the South and North Alabama railroad from Montgomery to Limekiln” (Sess. Acts 1866-7, pp. 144-46); the election held under said act; the conclusiveness of the certificate of the managers, as to the result of that election; the alleged difference between the propositions voted on and those afterwards accepted by the city authorities, and the validity of a tax levied on real estate only to pay the interest on the bonds issued,—these questions were decided adversely to the present appellants, in the case of *Winter v. City Council of Montgomery* (65 Ala. 403-17), which see.

4. *Appeal bond.*—When an appeal bond, in a chancery case, is made payable to the register, instead of the appellee, a judgment for costs can not be rendered against the sureties, on an affirmance, the only remedy against them being by action on the bond.

5. *Costs against relators.*—When a bill in equity is filed by the attorney-general in the name of the State, on the relation of certain private citizens and tax-payers, and for their benefit, costs may be adjudged against the relators, on a dismissal of the bill.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JNO. A. FOSTER.

The bill in this case was filed on the 29th April, 1874, by Benj. Gardner, as attorney-general, in the name of the State, on the relation of J. P. Stow and others, citizens, tax-payers, and owners of real estate in the city of Montgomery, against the corporate authorities of said city; and sought to enjoin the collection of a special tax of one per-cent. on the assessed value of all taxable real property in the city of Montgomery, which had been levied by the corporate authorities of the city, for the year 1873, to pay the interest on certain bonds of the city issued in aid of the South and North Alabama Railroad Company. The bonds were issued under authority of the special act approved December 7th, 1866, entitled “An act to authorize the city of Montgomery to aid in building and equipping the South and North Alabama railroad from Montgomery to Limekiln” (Sess. Acts 1866-7, pp. 144-46), and an election held in the city under the provisions of said act; and were in the following form:

“State of Alabama,) Know all men by these presents,
Montgomery County.) that the City of Montgomery, in the
State of Alabama, acknowledges to owe E. C. Hannon & Co.,
or the bearer hereof, one thousand dollars, on the first day of
July, 1888, at the agency of said city of Montgomery in the
city of New York, with interest thereon at the rate of eight
per-cent. *per annum*, payable semi-annually at the agency of
said city of Montgomery in the city of New York, on the first
days of January and July in each year, upon the presentation
and surrender of the coupons hereto attached, as they severally
become due; this bond being one of a series of five hundred

[The State, ex rel. Stow v. City Council of Montgomery.]

bonds, of one thousand dollars each, numbered from one to five hundred inclusive, issued by the said City Council of Montgomery, under the authority of an ordinance adopted by said City Council on the 9th April, 1868, and in pursuance of an act of the General Assembly of the State of Alabama, approved December 7th, 1866, and entitled 'An act to authorize the city of Montgomery to aid in building and equipping the South and North Alabama railroad from Montgomery to Limekiln;' and is convertible into the stock of the South and North Alabama railroad, at par, at the option of the holder thereof. In witness whereof, the Mayor and Treasurer of the said City of Montgomery have signed this bond, and caused the same to be duly registered and numbered in the office of the Clerk of the said city, and the seal of the said City of Montgomery to be hereto affixed, this, the first day of July, 1868." (Signed by the mayor and treasurer, and marked, registered and numbered by the clerk.)

The bill assailed the constitutionality of this special law, on the ground that its purpose and effect was to take private property, for the use of a private corporation, without requiring just compensation to be made to the owners; and because the propositions said to have been agreed on between the corporate authorities and the directors of the railroad company, and which were to be submitted to a vote of the citizens, were not set out in the act, nor referred to as being matter of record anywhere; and because such propositions were not in fact in existence. It assailed, also, the validity of the election, on the ground, as stated, that the mayor's proclamation "is void for uncertainty, and also on account of its discrimination, and was both delusive and fraudulent;" alleged that, as matter of fact, a majority of the votes cast at the election, by the persons authorized to vote, was not cast in favor of the subscription to the railroad; and that no proper certificate of the result of the election was ever returned by the managers thereof, or entered on the minutes of the city council; and insisted that, on these grounds, the subsequent proceedings of the corporate authorities of the city were not authorized by the election. It assailed, also, the subsequent proceedings of the corporate authorities, relating to the issue and transfer of the bonds, on the following (with other) grounds: 1. That the corporate authorities entered into an agreement with E. C. Hannon & Co., a company which had contracted with the railroad company for the building of its road from Montgomery to Limekiln, by which they obligated themselves to issue and deliver to said Hannon & Co., and did afterwards issue and deliver, the bonds of the city to the amount of \$500,000, at the price of \$450,000, for which they received the stock of the railroad company at par, when it was worth

[The State, ex rel. Stow v. City Council of Montgomery.]

only fifteen cents on the dollar. 2. That this was done before any portion of the railroad had been built, when its assets were inconsiderable, and its stock almost worthless; whereas said special act contemplated and required that the road should be first built as far as Limekiln, when its assets and stock would have greatly increased in value. 3. That bonds were issued only to the amount of \$500,000, whereas the said special act contemplated and authorized bonds to the amount of \$1,000,000, which would have given the city a controlling interest in the railroad; and that was the amount of subscription on which the citizens had voted at the election. 4. That the terms of the contract under which the bonds were issued and delivered to said Hannon & Co. were materially different from the terms stated in the propositions submitted to the vote of the citizens at the election. 5. That the bonds were made payable at the agency of the city in New York, when in fact the city had no agency there, and the act did not authorize them to be made payable extra-territorially. It was alleged, also, in an amended bill filed November 9, 1875, that said Hannon & Co., or their assigns, Samuel Tate and his associates, "sold and delivered said bonds, but without indorsement, to the business firm of Josiah Morris & Co. in the city of Montgomery, for \$450,000, in current money, and said bonds are now held by divers persons, whose names are unknown to informants, except P. W. Donaldson" and several others, who were brought in as defendants to the amended bill. The bill assailed the validity of the tax sought to be enjoined, on the ground that it was excessive, and was intended to raise a surplus, over and above the amount necessary to pay the interest on the bonds, to be used and applied to other purposes; and because it was assessed and levied upon real estate only, instead of both real and personal property. The prayer of the bill was, that the bonds might be declared void, the collection of the tax perpetually enjoined, and for other and further relief under the general prayer.

An answer to the bill was filed by the corporate authorities of the city of Montgomery, in their corporate name, insisting on the constitutionality of said special statute, the legality of the election held under it, the regularity of the subsequent proceedings on the part of the city authorities, the validity of the bonds, and of the ordinance levying a tax to pay the interest on them; and demurring to the bill for want of equity, on several grounds specifically assigned, and, among them, because it was not averred in the bill that the holders of the bonds had any knowledge or notice of the alleged irregularities preceding and attending their issue. A decree *pro confesso* was taken against the several bondholders who were made defendants to the bill.

[The State, ex rel. Stow v. City Council of Montgomery.]

A temporary injunction was granted, on the filing of the bill, by one of the circuit judges of the State, without requiring bond or affidavit from the relators; and Chancellor AUSTILL refused to dissolve the injunction, on motion, after answer filed. On final hearing, on pleadings and proof, Chancellor FOSTER, without passing on the demurrers, dissolved the injunction, and dismissed the bill, at the costs of the relators. An appeal from this decree was sued out in the name of "the State of Alabama, ex rel. J. P. Stow *et al.*," and each part of the decree was here assigned as error.

A bond for the costs of the appeal was taken by the register, payable to himself officially, "his heirs, executors and administrators," the condition of which was in these words: "Now, if the complainant aforesaid shall prosecute the said appeal to effect, and shall satisfy such decree as the Supreme Court may render in the premises, then this obligation to be null and void," &c. When the opinion of this court was first delivered, a judgment of affirmance was entered in the usual form, the costs of the appeal being adjudged against the obligors on the appeal bond. On application by the appellant's counsel, for a modification of this judgment, on the ground that the relators were not liable for costs, and that a summary judgment for the costs could not be rendered against the obligors on the bond, the judgment was amended, and rendered in accordance with the opinion as it now appears.

WATTS & SONS, and J. S. WINTER, for appellants.

W. A. GUNTER, *contra*.

STONE, J.—We have not been able to find any order of the court, by which the amended bill found in the record was allowed to be filed; but in what we have to say, we will treat the case as if the amended bill were a part of the record.

In the amended bill it is averred, "that a majority of the votes cast in said election, by those qualified to vote thereat, was not, in point of fact, cast in favor of the proposition to aid in building and equipping the said South and North Alabama railroad from Montgomery to Limekiln." In another place it is averred, that in the negotiations between the city council of Montgomery and the authorities of the railroad company, the former disregarded the agreement previously made, and secured to the city a smaller amount of the capital stock in the railroad company, than it was entitled to. If these facts exist, and had been shown at the proper time, they would have furnished a sufficient reason for enjoining the city authorities from issuing

[The State, ex rel. Stow v. City Council of Montgomery.]

and negotiating the city's bonds.—2 Daniel on Neg. Insts., §§ 1535–6.

The act of Dec. 7th, 1866 (Sess. Acts, 144), authorized the mayor of Montgomery to appoint commissioners to hold an election, and thus ascertain the sense of the qualified voters within the city, in the matter of rendering aid in the construction of the South and North Alabama railroad from Montgomery to Limekiln. The conduct of the election was confided to the commissioners thus to be appointed. When the favorable result of the election should be made known to the city council, then that body, and the board of directors of the South and North Alabama railroad, were authorized and empowered to carry into effect the provisions of said act, and of the propositions which preceded it. And in the event the election resulted in favor of aid to the railroad, then the city council of Montgomery were authorized to issue bonds of the city to carry it into effect. The bonds were issued, the railroad built, and those bonds, according to the averments of the bill, have passed into the hand of outside holders. Now all these steps—the proposition, the election, the agreement with the railroad company, and the issue of the bonds—were confided to the city council of Montgomery; and, as we have said above, if that body were taking any step in violation or disregard of the provisions of the statute, then the tax-payers of the city, at any time before the bonds passed into the hands of *bona fide* holders, could have intervened, and, by injunction, arrested such illegal act before its consummation.

The question, however, becomes a very different one, when the bonds have passed into the hands of *bona fide* holders, or purchasers. As to them, these irregularities stand for nothing. Such purchasers are regarded as innocent holders, when without collusion, and without knowledge to the contrary, they purchase negotiable bonds put on the market, issued by the proper authority, and having on their face the marks of regularity. They are not required to institute an inquiry, whether the trusted officers have done their duty, or have conformed to the requirements, made, by the law, conditions precedent to the execution of the power. The presumption is in favor of official propriety. “When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity, in the hands of such a holder, than any other commercial paper.”—2 Danl. Neg. Instr. § 1537; *Comm'rs of Knox Co. v. Aspinwall*, 21 How. U. S. 539; *Moran v. Comm'rs*, 2 Black, 722; *Gelpcke v. Dubuque*, 1 Wall. 175; *Supervisors v. Schenck*, 5 Wall. 772;

[Gordon, Rankin & Co. v. Tweedy.]

Mayor v. Lord, 9 Wall. 409; *Merchants' Bank v. State Bank*, 10 Wall. 604.

This principle is decisive of the two questions stated above, if the alleged bonds have passed into the hands of *bona fide* holders. This rests on the self-evident proposition, that if the city is liable for the bonds, then it has the authority to raise the means for their payment by taxation.

The present bill does not, in terms, show that the bonds are in the hands of innocent, *bona fide* holders. It does show, however, that they have passed into third hands, and it does not, in any manner, deny that such third persons are *bona fide* holders for full value. It simply states the fact, without note or comment. Now, if such holders acquired the bonds by fair, legal purchase, without notice, or something to put them on inquiry as to such alleged irregularities, then their rights are not impaired thereby. Pleadings are to be construed most strongly against the pleader, and material averments omitted are thereby admitted. The averment under discussion is negative in its character; and, therefore, if the bill had averred that the present holders of the bonds were not purchasers for value, the *onus* of proving such negative averment would not, under our rulings, have rested with the complainants. Still the averment was necessary. Without it, the complainants showed no right to relief.—Sto. Eq. Pl. § 263; *Carroll v. Malone*, 28 Ala. 521.

All the other questions raised by this record are settled adversely to appellants, in *Winter v. City Council*, 65 Ala. 403.

There can be no judgment, however, against the sureties on the appeal bond. Being made expressly payable to the register, it is not a statutory bond; and, hence, if there be any recourse against the sureties, it must be sought in an action on the bond. *Brown v. Levins*, 6 Por. 414; *Curry v. Barclay*, 3 Ala. 484; *Tarver v. Nance*, 5 Ala. 712; *Hinson v. Preslar*, 27 Ala. 643.

This suit was brought in the interest, and for the benefit of the relators. Let the costs of appeal be taxed against them.

The decree of the chancellor is affirmed.

Gordon, Rankin & Co. v. Tweedy.

Creditor's Bill in Equity, to set aside Fraudulent Conveyance.

1. *As to set-off of permanent improvements, against rents.*—The right to set off the value of permanent improvements, in reduction or recoup-
VOL. LXXIV.

[Gordon, Rankin & Co. v. Tweedy.]

ment of rents, is purely equitable, and is only allowed in favor of a *bona fide* occupant or possessor of land: actual notice of the assertion of a superior title is fatal to the occupant's claim for improvements, and the filing of a bill against him, by the person claiming such superior title, is the most solemn and authoritative form of notice.

2. *Deed constructively fraudulent, but standing as security for indemnity of grantee; liability for rents, and allowance for improvements and taxes.*—A conveyance being held constructively fraudulent at the suit of creditors, but allowed to stand as a valid security for the reimbursement or indemnity of the grantee, to the extent of the consideration actually paid; on the statement of the account, he is chargeable with rents during his possession, and is entitled to a credit for the value of permanent improvements erected by him before (but not after) the filing of the bill, and for all taxes paid, whether before or after the bill was filed.

3. *Taking additional testimony after remandment of cause.*—The chancellor's first decree in this cause having been reversed by this court on appeal, and the cause remanded, the grantee was properly allowed to take additional testimony, with the view of proving the actual consideration paid by him, for which, under the decision of this court, the deed was allowed to stand as a valid security; the same rule applying in such cases as in an application for a re-reference of matters of accounts, or for the re-examination of witnesses after the publication of testimony.

4. *Proof of transfer of certificates of railroad stock.*—The holder of certificates of railroad stock may rely on his possession, as *prima facie* evidence of his ownership; and if he undertakes to prove title by written transfer, the books of the company are the best evidence of it; but, on proof of the fact that the books are in another State, beyond the jurisdiction of the court, secondary evidence of the transfer is admissible.

5. *Value of wife's inchoate right of dower; how ascertained; judicial knowledge of Annuity Tables.*—There is no way in which the value of the wife's inchoate or contingent right of dower in her husband's lands can be proved, with any degree of accuracy, except by a calculation based on what are commonly called "Annuity Tables," the "American Table of Mortality" being now regarded as the orthodox standard throughout the United States; judicial notice of which table may be taken by the chancellor, or by the register on a reference.

6. *Same; when separate estate not to be computed.*—In estimating the value of the wife's dower interest in her husband's lands, when perfected by his death, the value of her statutory estate must be computed and deducted (Code, §§ 2715-16); but this principle has no application, where it is necessary to estimate the value of her inchoate interest in a tract of land, the relinquishment of which formed the consideration of the husband's conveyance of another tract to her, which conveyance is assailed by creditors.

APPEAL from the Chancery Court of Lawrence.

Heard before L. B. COOPER, esq., as special chancellor.

The bill in this case was filed on the 27th May, 1875, by the appellants, as creditors of Robert E. Tweedy, against said Tweedy and his wife; and sought to set aside, on allegations and charges of fraud, certain conveyances of property by said Tweedy to his wife. On the first hearing of the cause, the special chancellor sustained the several conveyances as valid, and dismissed the bill; but his decree was reversed by this court on appeal, and the cause remanded, as shown by the report of the case (71 Ala. 202-11), where all the material facts are stated. The present appeal is taken from the decree

[Gordon, Rankin & Co. v. Tweedy.]

rendered by the special chancellor on the confirmation of the register's report under a reference of the matters of account, and his several rulings on exceptions to the report; and these rulings are assigned as error. The opinion of the court states the material facts.

PHELAN & WHEELER, for appellants.

E. H. FOSTER, and R. O. PICKETT, *contra*.

SOMERVILLE, J.—When this case was last before us, at the December term, 1881, it was held that the deed of conveyance executed by R. E. Tweedy to his wife, bearing date in November, 1873, was not absolutely void for actual fraud, but only voidable, at the instance of existing creditors, for constructive fraud, on account of the grossly inadequate consideration upon which it appeared to have been based. It was permitted, however, on well settled principles of equity, to stand good as security for the purpose of reimbursing or indemnifying the grantee, to the extent of the true and real consideration proved.—71 Ala. 202-14.

Upon remanding the cause for further proceedings, Mrs. Tweedy amended her answer, interposing a claim for *permanent improvements* made upon the land by her during her adverse occupancy, and also for *taxes* paid during this period. The chancellor allowed her for improvements made *after*, as well as before the filing of the bill; and objection to this action on his part is raised by proper exception and assignment of error. In this, we are clearly of the opinion that he erred.

It is well known that, according to the strict rule of the common law, no allowance was made for such improvements, however valuable or beneficial, they being regarded as having been made at the peril of the possessor of the freehold. The right to set off such improvements in reduction or recoupment of rents recoverable by the complainant, is purely an equitable one, borrowed originally from the civil law by Courts of Chancery. The rule prevails only in favor of a *bona fide* occupant or possessor of land: He must be one who is not only in possession, but who asserts adverse ownership under color or claim of title. A mere naked intruder, or trespasser, as held by this court, does not come within the letter or spirit of the rule.—*The New Orleans & Selma R. R. v. Jones*, 68 Ala. 49; s. c., 70 Ala. 227. It is equally clear, on both principle and authority, that one who has knowledge of an adverse claim is not entitled to the right to set off improvements made after acquiring such knowledge. A *bona fide* occupant or possessor has been defined to be, "one who not only *honestly supposes*

[Gordon, Rankin & Co. v. Tweedy.]

himself to be vested with the true title, but *is ignorant that the title is contested by any other person claiming a superior right to it.*"—*Green v. Biddle*, 8 Wheat. 1; *Cole v. Johnson*, 53 Miss. 94; Sedg. & Wait's Trial of Titles to Land, § 694.

Actual notice of such adverse claim, according to the better rule, is generally held to be fatal to the occupant's claim for improvements, although mere *constructive notice*, such as the law implies from the record of a deed, is deemed insufficient. This principle seems to be generally adopted everywhere, so far as I have been able to discover, except in the State of Texas, where a different rule prevails, and actual notice is not regarded as a conclusive test of good faith. In *Jackson v. Loomis* (4 Cow. 168; 15 Amer. Dec. 347), the distinction under consideration seems not to have been discussed or clearly taken. The authorities generally, however, are not wanting in harmony.—2 Story's Eq. Jur. (Redf. Ed.) §§ 799, 799a, 799b; Trial of Titles to Land (Sedgw. & Wait), §§ 694, 705; Sedgwick on Dam p. 140 [12] *note*; Blackwell on Tax Titles, *marg. p.* 590–592; Burroughs on Tax. 345–6. The rule, which we here announce, was followed by this court in *Horton v. Sledge*, 29 Ala. 478, which was a suit in equity for partition of lands, and an account of rents and profits, brought by one tenant in common against another. The defendant was allowed only for such permanent and valuable improvements as were made "before he was apprised that his title was disputed."

The filing of the bill is considered by all the authorities as tantamount to actual notice. In fact, it is the most solemn and authoritative of all forms of notice.

No allowance, in view of these principles, should have been made, in taking the account, for improvements erected or made after the filing of the bill.

The defendant, Mrs. Tweedy, was entitled also to be reimbursed for any taxes paid by her on the land in controversy, during the time of her occupancy, whether before or after the filing of the bill. This is not denied; but it is insisted that the allowance for taxes, as made by the register, covered not only the taxes paid on the 328 acres in controversy, but also another tract of 180 acres, known as the "Harris tract," then in the defendant's possession. This view is, in our judgment, sustained by the evidence. The taxes paid on the three hundred and twenty-eight acre tract should alone have been allowed.

3. The chancellor committed no error, in our opinion, in permitting the defendant, Mrs. Tweedy, to take additional testimony, on remandment of the cause, with the view of proving the value of the consideration of the deed from her husband. This consideration is shown to embrace, not only the wife's contingent or inchoate right of dower relinquished by her in cer-

[Gordon, Rankin & Co. v. Tweedy.]

tain described lands, but also certain railroad stock, the shares of which belonged to her statutory separate estate, and the proceeds of which the husband had converted to his own use. The same rule should prevail here, as in applications made to the chancellor for re-reference of matters of account, or the re-examination of witnesses after the publication of testimony. It should never be permitted, as observed by Chancellor Kent, "merely to *alter or correct* testimony, after the cause has been heard and discussed, and decided upon the very matters of fact to which that testimony referred. It would be setting," he said, "a most alarming precedent, and would shake the fundamental principles of evidence in this court."—*Gray v. Murray*, 4 John. Ch. 415, cited and approved in *Harrell v. Mitchell*, 61 Ala. 270. The right to thus re-open a cause in equity, upon the merits of newly-taken testimony, in any of these various forms, is one which is discountenanced, as it should be, by the courts. But its exercise is addressed to the sound discretion of the chancellor, and it is often granted to correct some inadvertent or other defect in the evidence, or where there has been an omission to prove a writing, or even a particular fact upon which the case depends.—*Harrell v. Mitchell*, 61 Ala. 270; *Nunn v. Nunn*, 66 Ala. 35; *Johnston v. Glasscock*, 2 Ala. 218, 251; *Hood v. Pimm*, 4 Sim. 101.

4. There was no error in allowing secondary evidence to be introduced for the purpose of proving a transfer of the railroad stock, on the books of the company, to Mrs. Tweedy. While the defendant might have relied upon the mere possession by her of the certificates of stock, as *prima facie* evidence of ownership, if she undertook to prove a title by written transfer, it devolved on her to produce primary evidence of it, or else an excuse for failing to produce it.—*Patterson v. Kicker*, 72 Ala. 406; 2 Add. Contr. § 660; *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 202. It was proved, in excuse, that the books of the railroad company, containing a record of the original transfer, were in another State, beyond the jurisdiction of the court; and this fact authorized secondary evidence of the transfer, by copy, or otherwise. No other method of proof was practicable. *Elliott v. Stocks & Bro.*, 67 Ala. 290; *Ware v. Morgan*, *Ib.* 461.

5. It does not appear from the record what rule, if any, was adopted by the register in ascertaining the value of Mrs. Tweedy's contingent or inchoate right of dower in the lands conveyed by her husband to Houston and Bynum. We are aware of no possible way in which this can be done, except by a calculation based on what are commonly called "Annuity Tables." The rule was so declared when the case was last before us. *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 202. The question

[Gordon, Rankin & Co. v. Tweedy.]

was considered in *Jackson v. Edwards* (7 Paige's Ch. Rep. 386), decided in 1839, by Chancellor Walworth. After observing that the annuity tables furnish the means of ascertaining "the probable value of the wife's contingent right of dower during the life of the husband," showing, as they do, not only the value of annuities which depend upon the continuance of single lives of different ages, but upon the continuance of two or more joint lives, the following rule is declared: "The proper rule," he adds, "for computing the present value of the wife's contingent right of dower, during the life of the husband, is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and husband; and the difference between these two sums will be the present value of her contingent right of dower."—7 Paige, 408, citing *McKean's Pr. L. Tables*, 23, § 4; Hendry's *Ann. Tables*, 87, Prob. 4.

At the time this rule was announced, more than forty years ago, the courts were accustomed to resort to the "Northampton" and the "Carlisle" Tables of observation, showing the probabilities of human life by actual observation in the towns of Northampton and Carlisle, England. These deaths, however, were not taken from selected lives, but from the population generally. The field was so circumscribed, that they have never been deemed entirely reliable. We judicially know that the business of life-insurance has made rapid advancement in modern times, especially within the past twenty years. New fields of observation have been explored, based upon the combined and actual experience of American life-insurance companies. This has led to the tabulation of results in what is now known as the "American Table of Mortality," which is now regarded as the orthodox standard throughout the United States and the Canadas. This table is based on the lives of insurable, or healthy persons, and is known to be now in use generally by modern life-insurance companies, for the arithmetical estimate of valuations. We are of opinion that, for these reasons, our courts should resort to the "American Table of Mortality" as a basis for the calculation of annuities dependent on the probabilities of human life in this country.

We see no reason why the chancellor, or register, should be precluded from taking judicial knowledge of both the existence of this Table and its contents. It is customary for courts to take judicial knowledge of what ought to be generally known within the limits of their jurisdiction. This cognizance may extend far beyond the actual knowledge, or even the memory

[Gordon, Rankin & Co. v. Tweedy.]

of judges, who may, therefore, resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence. The rule has been held, in many instances, to embrace information derived informally by inquiry from experts.—1 Greenl. Ev. § 6; Gresley Ev. 295.

The register, in taking the account, will follow the rule above announced, having a proper regard to the value of the property, the health and age of the parties. The better practice would be, to examine a medical expert, with the view of ascertaining whether any change in the value of the dower should be reported, by reason of the failing or imperfect health of the parties at the time of the transaction.

6. No deduction should be allowed, on account of any statutory separate estate owned by Mrs. Tweedy. It is true that the statute provides, that the wife shall be excluded from her dower, if she own a statutory separate estate at the time of his death, greater in value than the dower interest, or that her dower shall be abated *pro tanto*, if her estate be less. Code, §§2715-16; *Williams v. Williams*, 68 Ala. 405. It can not be assumed, however, that she will continue to own in the future what she may own to-day. The tenure of property, as well as of life, is uncertain. The statute in question, moreover, is in derogation of the common law, which highly favored the wife's right of dower, classifying its protection with that of life and liberty. It must, for this reason, be strictly construed, and can have no operation except in the particular case designated, where the wife actually survives her husband, and an estimation is sought to be made of her perfect right of dower. It can have no application to the valuation of her inchoate right of dower.

We have examined the evidence, and decline to disturb the finding of the chancellor on the facts, or that of the register, except so far as his report is modified by the decree of the chancellor.

The decree is reversed, and the cause is remanded, that the issues relating to dower, taxes and improvements alone may be determined on a further reference to the register.

Blackshear v. Burke.

Bill in Equity by Trustee, for Sale and Distribution of Trust Property; Petition by Intervening Creditor.

1. *Sale of goods, with delivery of possession; rights of parties.*—On a sale of goods, even for cash, if the possession is delivered unconditionally to the purchaser, without any fraud on his part, the title at once vests in him, although the purchase-money is not paid; and the creditor can assert no lien on the goods, for the unpaid purchase-money.

2. *Waiver of tort in unauthorized sale.*—When a person's goods have been wrongfully sold or converted, he may waive the tort, and recover the money received for them; but a creditor, or any other person, can not make this election for him.

3. *Contracts of trustees; remedy of creditors.*—A trustee, express or implied, can not, in the absence of power specially conferred on him, impose a liability upon the trust estate by any contract or engagement he may make; and if he makes a contract which is beneficial to the estate, the person with whom he contracts has no equity to charge the estate, unless the trustee is insolvent, as shown by the exhaustion of legal remedies against him, and the trust estate is indebted to him.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed, on the 19th April, 1882, by Uriah Blackshear, against James F. Dugan and his several infant children by his deceased wife, Nancy F. Dugan; and sought to have a receiver appointed to take possession of certain property then in the possession of said Dugan, to preserve it from waste pending the suit, and to have it sold, if necessary, in order to effect an equitable division among the children, as beneficiaries under a deed of trust executed by the said Dugan, in which the complainant was appointed the trustee. The deed, a copy of which was made an exhibit to the bill, was dated February, 1877; recited as its consideration, besides natural love and affection, that the grantor had used "all of the separate estate of" his wife in the payment of his debts and carrying on his business; and described the property conveyed, and the trusts intended, in these words: "My storehouse and lot, and dwelling-house and lot, in the town of Brewton in said county; also, my entire stock of goods, wares and merchandise, my books, debts, notes and accounts, of every description; *in trust*, to and for the sole and separate use and benefit of my beloved wife, Nancy F. Dugan, during her life, free and exempt from the debts, contracts, control or incum-

[Blackshear v. Burke.]

brances of myself, or of any future husband she may have; but the said property hereby granted, with the rents and profits thereof, shall be and remain to the sole and separate use, benefit and behoof of my said wife; and upon her demise, the same to be distributed and divided among such of my children by her as may be surviving at her death, or their issue, in the event any of them shall have died before her, leaving issue."

The bill alleged that, immediately after the execution of this deed, Mrs. Dugan took possession of the property conveyed, and conducted the business in her own name, selling goods, and replenishing her stock, until her death, which occurred in March, 1879; that after her death, her said husband, James F., took possession of all the property, and conducted the business of the store in his own name, selling and buying goods, collecting the outstanding accounts, contracting debts, and wasting and misappropriating the assets; and therefore prayed the appointment of a receiver to take possession of the property, carry on the business, and collect the outstanding debts, until the property might be sold, if necessary, under the decree of the court, for equitable distribution among the infant beneficiaries. A receiver was appointed on the filing of the bill,—whether by the register or by the chancellor is not shown by the record,—and he took possession of the property, sold goods from the store, and collected debts. An answer to the bill was filed by said James F. Dugan, in which he incorporated a demurrer to the bill; but neither the answer, nor the demurrer, is material to the case as presented on this appeal.

At this stage of the proceedings, a petition was filed in the cause by Peter Burke, a merchant doing business in Mobile, in which he alleged that the trustee, after accepting the trust under the deed, permitted the said James F. Dugan to continue in possession of the stock of goods, and to carry on the business in the name of his wife; that said Dugan, while so carrying on the business in the name of his wife, bought goods from the petitioner, from time to time, which were added to the stock in the store, and sold from time to time with other goods; that when the bill was filed, in May, 1882, a balance of \$129.75 was due to the petitioner, on account of goods sold to said Dugan between November, 1881, and March, 1882; that these goods, or the greater part of them, were in the store when the receiver took charge of it, and were sold by him, and converted into money, and that said Dugan was insolvent. Dugan, the receiver, and the complainant in the bill, were made defendants to this petition; and the prayer was, that an account might be taken to ascertain the amount due to the complainant, that a lien be declared in his favor on the moneys in the hands of the receiver, and that he paid out of the moneys as the court might

[Blackshear v. Burke.]

direct. An answer to the petition was filed by the complainant, alleging that James F. Dugan had no interest in the business after the execution of the deed, but acted only as clerk for his wife; and while admitting that said Dugan "may have bought the goods as stated from the petitioner," he alleged that "they were purchased in the name of said Nancy F. Dugan after her death, of which fact said petitioner was informed before he delivered said goods to said James F. Dugan." He also demurred to the petition, "because it contains no equity," and "because it shows on its face that the complainant has a full, complete, and adequate remedy at law." An answer to the petition was also filed by the guardian *ad litem* of the infant defendants, denying its allegations, and requiring strict proof thereof.

An agreement of record was entered into, between the solicitors of the petitioner and the complainant in the bill, in these words: "It is agreed that a greater portion of the goods set forth in the account appended to the petition was received by the receiver in this cause, and that the remaining portion was sold by said James F. Dugan, and that he received the proceeds of the sale of said goods so sold by him in the management and control of said business. It is agreed, also, that the facts stated in the petition are true, except as controverted in the answer; and that all of the facts stated in the answer are true, so far as this proceeding is concerned." The cause being submitted for decision, on the bill and answers, petition and answer thereto, and this agreement, the chancellor rendered a decree, ordering the receiver to pay to the petitioner, out of the moneys in his hands arising from the sale of goods in the store, the balance due on account, \$129.75, with interest. From this order, or decree, the complainant in the bill appeals, and here assigns it as error.

There was a joinder in error by the appellee, and he also moved to dismiss the appeal, on the ground that an appeal would not lie from the order; and on the part of the appellant an application for a *mandamus* was submitted, in the event the appeal was dismissed.

FARNHAM & RABB, and J. M. WHITEHEAD, for appellant, cited *Daily v. Daily*, 66 Ala. 266; *Vanderveer v. Ware*, 65 Ala. 606; *Dickinson v. Conniff*, 65 Ala. 581; *Steele v. Steele*, 64 Ala. 438; 1 Brick. Digest, 639, § 3; *Ib.* 731, §§ 1343-4; *Abrams v. Hall*, 59 Ala. 386; *Flewellen v. Crane*, 58 Ala. 627.

W. E. RICHARDSON, and JNO. S. JEMISON, *contra*, cited *Coopwood v. Wallace*, 12 Ala. 796; *Charles v. Dubose*, 29 Ala. 371; *Meyers v. Meyers*, 2 McCord's Ch. 214, or 16 Amer. Dec. 648;

[Blackshear v. Burke.]

1 Wait's Ac. and Defenses, 29; *Wiswall v. Stewart & Easton*, 32 Ala. 433; *Smith v. Harrison*, 33 Ala. 706; 1 Perry on Trusts, § 246; 2 *Ib.* §§ 813, 907.

BRICKELL, C. J.—The case has been very fully argued upon its merits, and can, without injury to either of the parties in interest, be determined finally without the expression of an opinion upon the regularity or propriety of the petition which was entertained in the Court of Chancery; or without deciding whether the order or decree of the chancellor is of the character which will support an appeal, or whether the remedy of the party aggrieved by it is *mandamus* for its vacation. If the latter is the appropriate remedy, an application for the writ is pending, and a dismissal of the appeal would result in the granting of the writ, as we are of opinion the order or decree is manifestly erroneous.

We can see no ground, legal or equitable, upon which the decree of the chancellor can be supported. There was an absolute, unconditional sale of the goods to Dugan, accompanied by a delivery of possession. The title vested in the purchaser, and from the moment of delivery of possession the relation of buyer and seller was changed into that of debtor and creditor. This is true, even where there is a sale of goods for cash; if the seller, without demanding the purchase-money, not being induced by the fraud of the buyer, delivers the goods to him unconditionally, the title vests in the buyer, and he becomes the absolute owner. There was no lien upon the goods for the payment of the price; for we are not aware that a lien for the purchase-money of chattels, with the possession of which the vendor parts absolutely and unconditionally, has ever been implied or recognized.—1 Lead. Cas. Eq. 502; *Jones v. Bird*, 8 Leigh, 510; *Beam v. Blanton*, 3 Ired. Eq. 59; *Lupin v. Marie*, 6 Wendell, 77.

The goods may have been wrongfully sold by the receiver, and the proceeds of sale may have increased the funds in his hands, which are under the control, and subject to the disposition of the court. If this be true, the wrong was done to Dugan; his goods were converted into money, and he only, not a creditor for him, can elect to waive the tort and recover the money into which they have been converted.—*Lewis v. Dubose*, 29 Ala. 219.

Take the other theory, upon which it seems to be supposed that the claim of the petitioner may be maintained—that Dugan was a trustee *in invitum*, and that there had been a ratification of his purchase of the goods. The trust estate could only be made liable to the creditor trusting him, to the extent that it was indebted to him upon a final settlement of his accounts as

[Wilkinson v. Searcy.]

trustee. A trustee, express or implied, can not, in the absence of express power conferred upon him, by his contracts or engagements impose a liability upon the trust estate. If he make a contract which is beneficial to the estate, the creditor, or person with whom he contracts, has no equity to charge the estate, unless he be insolvent, which must be shown by the exhaustion of legal remedies against him, and the estate is indebted to him. In that event, a court of equity may subrogate the creditor to the right of the trustee to charge the trust estate. *Jones v. Dawson*, 19 Ala. 672; *Mulhall v. Williams*, 32 Ala. 489; *Askew v. Myrick*, 54 Ala. 30. That is not the case made by the petition.

Let the decree of the chancellor be reversed, and a decree will be here rendered dismissing the petition, at the costs of the petitioner in this court; and he will pay the costs of the petition in the Court of Chancery, to be taxed by the register.

Wilkinson v. Searcy.

Bill of Interpleader by Purchaser of Land.

1. *When bill of interpleader lies.*—When mortgaged lands are sold and conveyed by the mortgagor, by deed with covenants of warranty, the purchaser paying part of the price in cash, and giving his note for the residue; if the note secured by the mortgage and the note for the unpaid purchase-money are afterwards transferred to different persons, the purchaser can not maintain a bill of interpleader against them.

2. *Abatement of purchase-money.*—When lands are conveyed with covenants of warranty against incumbrances done or suffered by the vendor (Code, § 2193), and are at the time subject to an outstanding mortgage executed by him, this is a breach of his covenants of warranty, which entitles the purchaser to claim an abatement of his note for the unpaid purchase-money, to the extent of the balance due on the mortgage debt, unless his note has been assigned to a third person, and he has estopped himself from setting up that defense against the assignee.

3. *Estoppel en pais against maker of note.*—If a person who is about to purchase, or take an assignment of a promissory note, applies to the maker for information, is assured by him that there is no defense against it, and buys the note on the faith of that representation, the maker is estopped from setting up against him any defense which then existed.

4. *Revision of chancellor's decision on facts.*—The burden of proof being on a party who asserts an estoppel *en pais*, and the evidence being conflicting, if the chancellor holds the evidence insufficient to establish it, this court will not reverse his ruling, "unless clearly convinced that he erred."

5. *Errors not injurious to appellant.*—When errors are assigned by one only of several appellants, this court will only consider errors which are prejudicial to him.

[Wilkinson v. Searcy.]

6. *When appeal lies.*—An appeal lies only from a final decree, except where the statutes expressly give an appeal from an interlocutory decree.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JNO. A. FOSTER.

The original bill in this case was filed on the 12th December, 1881, by Francis M. Searcy, against W. W. Wilkinson, Jacob L. Schley, and others; and sought, principally, a decree ascertaining how much the complainant should be compelled to pay, and to whom, on a note which he had given for a part of the purchase-money for a tract of land sold and conveyed to him by said Schley, and to enjoin the several defendants from asserting any claim or title to the land. The tract of land contained 150 acres, and was sold and conveyed by said Schley to complainant in November, 1880, at the price of \$2,000; of which sum, one half was paid in cash, and for the other half the purchaser executed his promissory note, payable on the 1st October, 1881, to the order of Thomas E. Hall. This note was transferred by Hall, for value, to said W. W. Wilkinson, who brought suit on it against the maker; and the bill prayed an injunction of this action at law, until the court should determine to whom the money due on it should be paid. At the time of the sale and conveyance by Schley to complainant, there was an outstanding mortgage on the land, given by said Schley to secure the delivery of ten bales of cotton, according to the terms of a written obligation signed by him, which was dated December 13th, 1878, and in these words: "On the 1st day of October, 1879, I promise to deliver in Fort Deposit, Alabama, to William Hamilton, ten bales of cotton, averaging 500 lbs.; four bales to bear 8 pr. ct. interest, and six bales to be delivered at said place on the 1st October, 1880." This mortgage and obligation were transferred by said Hamilton, about the 1st August, 1879, to one Lightfoot, who afterwards transferred them to the administrator of the estate of James H. Witherspoon, deceased; and on the settlement of the administration of said estate, said mortgage and obligation became the property of the heirs and distributees, who afterwards brought an action of ejectment to recover the land, claiming under the mortgage. The bill alleged that "the heirs of said Witherspoon claim that a large sum, to-wit, the sum of \$1,000, is still due on said obligation given to said Hamilton, and that said sum is a lien on said land secured by said mortgage; while said Schley and said Wilkinson both insist that said note or obligation has been fully paid." The Witherspoon heirs were made defendants to the bill, and an injunction of their action of ejectment was prayed. The bill alleged, also, that "complainant is ready and offers to pay whatever sum may be due

[Wilkinson v. Searcy.]

on his said note, to whomsoever this honorable court may decree is entitled to the same; and he has been so ready ever since said note fell due, and has only been prevented from paying said note by the fact that it was claimed by said Wilkinson and said Witherspoon heirs, and complainant did not and could not know to whom he could safely pay the sum due by him." The prayer of the bill was in these words: "Orator prays that your honor decree what amount, and to whom, orator is to pay on said note; that your honor decree that, on payment of the sum that may be so decreed, each of said defendants, and all persons holding under either of them, be perpetually enjoined from asserting any claim or title to said land; and orator prays for general relief."

An answer to the bill was filed by Wilkinson, alleging, among other things, that he purchased said note from Hall, for a valuable consideration, on the 10th June, 1881; "that when he was about to purchase said note, and before he did purchase it, respondent went to said complainant, and informed him of his intention to purchase or trade for said note, and inquired if complainant had any defense to said note; that complainant then said to this respondent, that he had no defense, that it was 'all right,' and that he would pay said note at its maturity; and afterwards, relying upon these statements and this promise, respondent purchased said note from said Hall, for a valuable consideration, and said Hall indorsed said note to this defendant. Defendant sets up these facts by way of plea, as well as answer." A demurrer to the bill for want of equity, because it did not present a proper case for interpleader, was incorporated in the defendant's answer.

An amended bill was afterwards filed, alleging that said Schley "is insolvent, and, for this reason, his warranty in said deed is of no value to orator;" and an answer to the amended bill was filed by Wilkinson, denying its allegations, requiring proof thereof, and repeating his grounds of demurrer as assigned to the original bill. It is unnecessary to notice the pleadings of the other defendants.

The chancellor overruled the demurrers to the bill, and also overruled a motion to dismiss for want of equity; and at a subsequent term, under a submission on pleadings and proof, holding that Wilkinson had failed to establish his plea of estoppel, he rendered the following decree: "It is therefore ordered, adjudged and decreed, that the several demurrers of the defendants are hereby overruled, and the injunction against W. W. Wilkinson is hereby retained until the further order of the court. It is further ordered, adjudged and decreed, that the defendants who are now shown to be the holders of the mortgage made by Schley to Hamilton, to-wit, are entitled to a fore-

[Wilkinson v. Searcy.]

closure of the same, it appearing from the testimony that a portion of the same remains due and unpaid. It is therefore referred to the register to state an account, and that he ascertain and report how much is still due upon said mortgage, principal and interest, after allowing all legal and equitable credits to which the same is entitled. All other questions are reserved until the coming in of said report."

The appeal is sued out by Wilkinson, and he alone assigns errors. The errors assigned are, the overruling of the demurrers to the bill, the overruling of the motion to dismiss, and each part of the final decree.

J. C. RICHARDSON, and JNO. GAMBLE, for the appellant.—(1.) The bill was without equity, because the facts stated do not authorize an interpleader.—Adams' Equity, §§ 202–03; 2 Story's Equity, §§ 809–14, 820–22; Story's Eq. Pl. §§ 292–97; *Hayes v. Johnson*, 4 Ala. 267; *Gibson v. Goldthwaite*, 7 Ala. 888; 4 Wait's Actions and Defenses, 151–53. (2.) Without regard to the merits or defects of the bill, the defense set up by Wilkinson presents a clear equitable estoppel.—*Plant & Co. v. Voegelin*, 30 Ala. 160; *Cloud v. Whiting*, 38 Ala. 59; *Drake v. Foster*, 28 Ala. 654; *McCravey v. Remson*, 19 Ala. 430; Story's Eq. Pl. § 267 a; *Adams v. Steele*, 21 Ala. 534; *Com. v. Moltz*, 10 Barr, Penn. St. 527.

COOK & ENOCHS, and R. M. WILLIAMSON, *contra*.

STONE, J.—The present bill appears to have been drawn with the intention of making it a bill of interpleader, and counsel seem to regard it as falling within that class. So treating it, it is contended for appellant, that his testimony shows a right in him to recover of Searcy, independently of any liability the lands purchased by the latter may rest under, by reason of the Hamilton note and mortgage, now held and claimed by the Witherspoons. Wilkinson's interest, and only interest in this controversy, would seem to be, first, to show that Searcy had estopped himself from setting up the incumbrance created by the Hamilton mortgage, as a defense to the note held by him, Wilkinson; and failing in this, second, to reduce the sum of that incumbering indebtedness to as low a figure as possible.

The facts of the case are about as follows: On the 13th day of December, 1878, one Schley executed an obligation in writing to Hamilton, to pay him certain bales of cotton, and contemporaneously he and his wife executed a mortgage on a described tract of land, of about one hundred and fifty acres, to secure its payment. This mortgage was proved, certified, and recorded in the proper office, in due time. This written obli-

[Wilkinson v. Searcy.]

gation to deliver cotton was transferred two or three times, until it became the property of the Witherspoon distributees. It passed from the Hamilton estate prior to June 10th, 1881. In November, 1880, Schley sold, and he and his wife conveyed, the same lands to Searcy, at the agreed price of two thousand dollars, one half of which was paid in cash; and for the remaining thousand dollars, Searcy executed his note, due October 1st, 1881. This note was made payable to one Hall,—for what purpose is not shown,—and it recites the consideration upon which it was given. The deed from Schley and wife to Searcy contains the words “grant, bargain and sell,” and hence contains the statutory covenant of warranty against “incumbrances done or suffered by the grantor.”—Code of 1876, § 2193. This note was traded and indorsed by Hall to Wilkinson, for a valuable consideration, on the 10th day of June, 1881. No question is, or probably can be raised, on the fact that the note is made payable to Hall, instead of Schley, the vendor of the land.

It will thus be seen, that the claim of the Witherspoons rests on a note executed by Schley to Hamilton, secured by a mortgage on the lands. Searcy is not personally liable for this debt. The most that can be affirmed of it is, that the lands he purchased from Schley are bound for its payment. Wilkinson's claim is the personal debt and contract of Searcy, secured probably by a vendor's lien on the same land. It requires no argument to show that these two claims are not for one and the same fund or debt. Searcy owes one of the debts—that to Wilkinson. He does not owe the other. The facts do not warrant a bill of interpleader, properly so called. Hamilton, and those claiming under him, are not placed in fault. The mortgage, properly proven, was recorded in time; and this gave notice to all persons, of its existence and contents. It was Searcy's own *laches* that he did not search the record, and he shows no right to shift on to the shoulders of the Witherspoons the burden of defending him against Wilkinson's claim. His own undue, if not blind confidence, has exposed him or his lands to the double liability.—2 Story's Equity, §§ 806–7, 820, 821, 822, 824, 824 *a*; 4 Wait's Ac. & Def. 153–4.

2. But there is an aspect in which the present bill, as amended, does contain equity. Schley is shown to be insolvent, so that Searcy can obtain no reimbursement by suit on the covenants of his deed, in the event the Witherspoon claim is valid, and there is anything due upon it. That being a prior incumbrance on the land, of Schley's own creation, it is a breach of the covenants of his deed; and to the extent that Searcy may have his land charged by that incumbrance, he may set it off, and claim a corresponding rebate from his unpaid purchase-money

[Wilkinson v. Searcy.]

note, unless he has estopped himself from making that defense against Wilkinson, the present holder.—*Smith v. Pettus*, 1 Stew. & Por. 107; *McLemore v. Mabson*, 20 Ala. 137; *Walton v. Bonham*, 24 Ala. 513; *Kelly v. Allen*, 34 Ala. 663, 670.

3-4. Under this principle, the inquiry arises, has Wilkinson proven the truth of his plea, that before he purchased the note, he inquired of Searcy, and that the latter informed him he had no defense to the note, save a cross demand against Schley of \$189; and that relying on Searcy's said statement, he (Wilkinson) purchased the note, and entered the credit of \$189 claimed by Searcy. The chancellor, passing on the testimony, found this issue of fact against Wilkinson.

As stated by the chancellor, the *onus* of proving the truth of this plea rested on Wilkinson. The testimony is in irreconcilable conflict. Wilkinson and his son, C. L. Wilkinson, testify to the truth of the plea. Searcy testifies that he made no such representation. Lightfoot testifies that Wilkinson did have knowledge of the debt and mortgage to Hamilton. Reid testifies that, while acting as agent for Wilkinson, in attempting to collect a debt due from Schley to Wilkinson, he learned that the debt and mortgage from Schley to Hamilton existed, but he did not know whether Wilkinson knew it or not. All this testimony relates to a time anterior to June 10th, 1881, when Wilkinson purchased the Searcy note. We can not say we are "clearly convinced" the chancellor erred in pronouncing on this disputed question of fact.—*Nooe's Ex'r v. Garner's Adm'r*, 70 Ala. 443. We incline to the opinion, that all the interested parties had knowledge of the Hamilton debt and mortgage, but they believed it invalid, and did not regard it in their dealings as opposing any obstacle.

5. Wilkinson alone assigns errors in this case, and we can consider no question that does not affect him. As we have said above, the bill contains equity, and presents a case for injunction against him. He has failed to establish the truth of his plea in avoidance of that equity, and it results, that the chancellor rightly refused to dissolve the injunction. He retained it, and rightly retained it, until it should be ascertained whether any thing, and now much, was due to the Witherspoons on the Hamilton mortgage. When that is ascertained, a perpetual injunction should be ordered, of so much of the Wilkinson debt as is equal to the sum found due to the Witherspoons, if any thing.

As we have said, any other questions than those affecting Wilkinson, we do not, and can not consider, under his assignments of error. He is interested in the question of indebtedness *vel non*, under the Hamilton mortgage, and the extent of

[May v. Marks.]

it. That question has not been passed on by the chancellor; and hence it has not been determined to what extent, if any, Searcy is entitled to relief against Wilkinson. That question is the real equity in this case. Schley testifies, that while Lightfoot held the Hamilton note and mortgage, he, Schley, paid ten bales of cotton on it, and that he owes nothing. If that debt is paid, then Searcy's bill, as against Wilkinson, is without merit. This is the *gist* of the suit, and, it would seem, further proof is necessary; at all events, it has not been decided.

The decision of the court below was not rendered on the pleadings. It was on the evidence. The appeal is prosecuted, not from an interlocutory decree, but from what is claimed to be a final decree. The final relief claimed in this case is a perpetual injunction of the whole or a part of the Wilkinson claim. Till that decree is pronounced, there is no final decree in this cause.—Code of 1876, § 3918.

We should, perhaps, add, there is nothing in the pleadings or evidence in this record, which invalidates the mortgage given to Hamilton. The question, as now presented, is, whether there is any thing, and how much, due upon it.

Appeal dismissed.

May v. Marks.

Statutory Real Action in nature of Ejectment.

1. *Sale of decedent's lands, for payment of debts; conclusiveness of order on collateral attack.*—When a sale of lands by an administrator under a probate decree, for the payment of debts, is collaterally attacked,—as where the heirs bring ejectment against a person claiming under the sale,—mere irregularities in the proceedings are not available, and the heirs can not recover unless the sale is void.

2. *Same; validity of grant of administration.*—The granting of the order of sale, on the petition of a person claiming to be the administrator, involves a judicial determination of the fact that he is such administrator; and the heirs can not impeach the sale, on such collateral proceeding, on the ground that his appointment was invalid, or that his office had expired.

3. *Same; payment of purchase-money, and notice to heirs.*—When the payment of the purchase-money is reported to the court by the administrator, the sale confirmed, and he is ordered, on his own application, to execute a conveyance to the purchaser, the failure to notify the heirs of any or all of these proceedings does not render the sale void, and is not available to the heirs on a collateral attack; nor can they be permitted to contradict, by oral evidence, the recitals of the record as to the payment of the purchase-money.

[May v. Marks.]

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This action was brought by Carey May and others, children and heirs at law of Wm. S. May, deceased, against Spencer C. Marks, to recover a tract of land containing about one thousand acres, together with damages for its detention; and was commenced on the 5th February, 1883. The facts of the case, as agreed on by the parties, are thus stated in the bill of exceptions: "William S. May died in said county of Lowndes, in the fall of the year 1865, being then seized and possessed of the lands now sued for; and the plaintiffs in this suit are his only heirs at law. Shortly after the death of said May, letters of administration on his estate were granted by the Probate Court of said county to R. J. Dudley; and said estate was duly declared insolvent by said Probate Court, in January, 1868. Said Dudley was continued in the administration of said estate until May, 1871, when he was removed, and William H. Hunter, who was at that time the sheriff of said county, was appointed administrator *de bonis non*, by virtue of his said office as sheriff. Said Hunter never resigned said administration, nor was he ever removed; but his said office of sheriff of said county expired on the 13th November, 1871, and one L. J. Bryan was then elected and qualified on that day as his successor in said office as sheriff. On May 20th, 1872, without any other appointment than as above stated, said Hunter filed his petition in said Probate Court as administrator, for a sale of said lands for the payment of debts; a copy of which petition is hereunto annexed as an exhibit, and made a part of this agreement. Said petition was set for hearing on the 20th July, 1872, and was continued to the 28th October, 1872; notice being given to all the parties interested, as stated in the decree hereinafter named. On said 28th October, 1872, said Probate Court made an order and decree for the sale of said lands, a copy of which is hereunto attached as an exhibit. Said order directed the sale to be made on the following terms: one third of the purchase-money to be paid in cash, and the balance in one and two years, with interest from the day of sale. Under and in pursuance of said order, said Hunter sold said lands at public outcry, at the court-house of said county, on the 6th January, 1873, for one thousand dollars, being at the price of one dollar per acre, and reported said sale to said Probate Court on the 9th January, 1873; and said sale was on that day confirmed, by order of said court. On the 16th May, 1873, said Hunter, as administrator, reported to said court the payment of the purchase-money for said land; and an order was thereupon made by said court, that conveyance be made by said Hunter, as administrator, to W. F. Witcher, the purchaser at said sale, conveying to him all right,

[May v. Marks.]

title and interest, which said W. S. May had in said land at the time of his death. On the 17th May, 1873, said Hunter, as such administrator, made to said Witcher a conveyance, regular in form, conveying to him all right, title and interest, which said May had in said lands at the time of his death. On the 8th October, 1877, said Hunter made a final settlement of his administration on said estate, in which settlement he charged himself with the proceeds of the sale of said lands; and a decree was thereupon made by said court, a copy of which is hereto attached as an exhibit. It is admitted, that the purchase-money for said land paid by said Witcher was a claim which he had against said estate, for his fees for services rendered by him as attorney for said Hunter in his said administration, which claim and voucher were allowed by said court on said final settlement; and it is admitted, also, that the said services so rendered by said Witcher were rendered by him to said Hunter after his said term of office as sheriff had expired. It is admitted, also, that of said claim against said Hunter as administrator, being the balance ascertained to be due from him on said final settlement, \$1,420.38, besides costs, only \$300 has been collected; and that said Hunter is insolvent. It is further agreed, that no notice of the said proceedings of said Probate Court, in granting the said order confirming said sale, and directing said Hunter, as administrator, to make a conveyance of said lands to said Witcher, was given to the heirs at law of said W. S. May. It is admitted, also, that on the 5th January, 1874, said Witcher sold and conveyed said lands, in consideration of \$3,500 paid him, to James Marks & Co., of which firm defendant was a member."

The proceedings in the Probate Court, as shown by the exhibits, are all regular on their face, and in the usual form. The above being all the evidence, the court charged the jury, at the instance of the defendant, that they must find for him, if they believed the evidence; and refused a general charge in favor of the plaintiffs, which was requested by them in writing. The plaintiffs excepted to the charge given, and to the refusal of the charge asked, and they now assign these rulings as error.

COOK & ENOCHS, for appellants.—Hunter's letters of administration attached to his office as sheriff, and expired with that office.—*Ragland v. Calhoun*, 36 Ala. 606; *Landford v. Dunklin & Reese*, 71 Ala. 594. The Probate Court had judicial knowledge of the expiration of his term of office, and no more power to continue or prolong his administration, than to prolong his term of office as sheriff; and it could not accomplish by indirection—by recognizing any of his acts as official—what

[May v. Marks.]

it had no power to do directly. Hunter not being the administrator when he filed the petition, the order of sale founded on it is void for want of jurisdiction—is a nullity.—*Wyman v. Campbell*, 6 Porter, 219; *Satcher v. Satcher*, 41 Ala. 26. If the order of sale had any validity, its terms were binding on the administrator, and on the court itself, which was the real vendor; and the court had no power to confirm a sale, and thereby divest the title of the heirs, until the purchase-money was in fact paid pursuant to the terms of sale; yet the court confirms the sale, and afterwards orders a conveyance to be executed to the purchaser, when the report of the administrator showed on its face that the entire purchase-money was not in fact paid.—*Dugger v. Tayloe*, 60 Ala. 504; s. c., 66 Ala. 444; *Cruikshanks v. Luttrell*, 67 Ala. 318; *McCully v. Chapman*, 58 Ala. 325; *Doe v. Hardy*, 52 Ala. 291. The heirs had no notice of these proceedings, and no opportunity to assert their rights; and they now show, in addition to the facts apparent on the record, that none of the purchase-money was in fact ever paid—that the claim allowed as a payment by the administrator was for professional services rendered to him after his term of office had expired, for which the estate was not responsible. If these proceedings are sustained as valid, the plaintiffs have lost their lands under the forms of law, but in violation of the fundamental principles on which all judicial proceedings are founded.—*Lamar v. Gunter*, 39 Ala. 324.

CLOPTON, HERBERT & CHAMBERS, *contra*.—In decreeing a sale of the land on the petition of Hunter, as administrator, the Probate Court decided, by necessary implication, that he was in fact such administrator, and the fact can not be now denied.—*Landford v. Dunklin & Reese*, 71 Ala. 594. Hunter being the administrator, or being so adjudged, the court acquired jurisdiction when it recognized and acted on his petition; and mere irregularities in the subsequent proceedings, such as are here set up, do not affect their validity. The proceedings are *in rem*, not *in personam*, and notice to the heirs was not necessary. The proceedings are regular on their face, and are conclusive in this collateral attack.—*Satcher v. Satcher*, 41 Ala. 26; *Bibb v. Orphans' Home*, 61 Ala. 326; *Wilburn v. McCalley*, 63 Ala. 445; *Dugger v. Tayloe*, 60 Ala. 518; *Anderson v. Bradley*, 66 Ala. 263; *Hudgens v. Cameron*, 50 Ala. 379.

SOMERVILLE, J.—The case is one of ejectment, in which the plaintiffs claim title as heirs at law of one William S. May, who is shown to have died seized and possessed of the lands in controversy. The defendant claims title through one Witcher, who purchased the land under a decree of the Probate Court

[May v. Marks.]

ordering a sale for the payment of the debts of the decedent. The question presented is, whether the sale made on the application of Hunter, claiming to be the administrator of May's estate, was *void*. This being a collateral assailement of the decree of sale, there can be, otherwise, no recovery by the plaintiffs, mere reversible errors or irregularities availing them nothing in this action.

It is insisted, in the first place, that the sale was void, because it is shown that Hunter was not administrator of May's estate at the time he filed the petition, obtained the order of sale, or made the conveyance to Witcher, as purchaser. Before these proceedings transpired, the term of his administration had ceased; and it is urged that this fact can be shown, to impeach the decree on collateral attack. It is true that Hunter's letters of administration were granted to him as sheriff *virtute officio*, under the provisions of the statute (Code, 1876, §§2362-72); and, therefore, the grant attached to the office, and expired with it. This defect would have constituted an error, for which the decree of the Probate Court could have been reversed on appeal, had it been thus directly assailed. But it is no ground for collateral attack, such as renders the order of sale absolutely void. The precise point was so adjudged in *Landford v. Dunklin & Reese*, 71 Ala. 594. It was there held, that the granting of the order of sale involved a judicial determination of the fact that the petitioner was such administrator, as alleged in his petition, and that the sale could not be impeached, in a collateral proceeding, on the ground that he was not in fact the administrator, or that the grant of administration as to him was invalid. We are content to adhere to the conclusion reached in that case.—Freeman on Judgt. § 523; Freeman Void Jud. Sales, sec. 4, p. 21, note 25; *Burke v. Mutch*, 66 Ala. 568; *Coltart v. Allen*, 40 Ala. 155.

The sale was not rendered void for failure to give notice to the heirs, either of the confirmation of the sale, the report of payment of the purchase-money, or of the order authorizing the administrator to make a conveyance. The conveyance was made to Witcher, on application of the administrator; and, *as between the administrator and the heirs*, the proceedings were *in rem*, and not *in personam*. The rule has long been settled in this State, that, where the application of an administrator for the sale of lands contains all the allegations necessary to give the Probate Court jurisdiction, any failure *on the part of the administrator* to notify the heirs, or other adverse party in interest, as to any intermediate proceeding, will not avail, on collateral presentation, to avoid either the order, the judgment, or title acquired under it by a purchaser.—*Wilburn v. McCalley*, 63 Ala. 436, 445; *Field v. Goldsby*, 28 Ala. 218;

[Robinson v. Allison.]

Satcher v. Satcher, 41 Ala. 26; *Wyman v. Campbell*, 6 Port-219. In *Dugger v. Tayloe*, 60 Ala. 504, it was held, however, that where the application for an order of conveyance was by the purchaser, as against the administrator, the proceeding became one *in personam* as to the parties, and notice to the administrator was essential, or else a decree rendered without it was void. In *Anderson v. Bradley*, 66 Ala. 263, the application was by a sub-purchaser, and notice to the heirs was held necessary, the question being presented on direct appeal from the decree of the Probate Court.

We are of opinion, that the heirs can not attack the decree in question collaterally for want of notice, such as is shown in the record.

Nor can they be permitted, in an action of ejectment against the purchaser at an administrator's sale, to collaterally attack the decree of sale, by contradicting by oral evidence the recital in the proceedings of the Probate Court as to the fact of the payment of the purchase-money. It is very true that this has been permitted, on a bill filed by an administrator *de bonis non*, to enforce the payment of the purchase-money against the land. As against him, and for this particular purpose, the record is not held to be conclusive, but only *prima facie* correct. *Wallace v. Nichols*, 56 Ala. 321; *Corbitt v. Clenny*, 52 Ala. 480. But the case is different, where the issue is one at law involving the legal title, and the effect of the oral evidence would be to contradict the record, and destroy or annul the title acquired under it. There is a clear distinction, on sound principles, between the two classes of cases, which is recognized in the past decisions of this court by our predecessors, and which we fully approve.—*Dugger v. Tayloe*, 46 Ala. 320; *Hudgens v. Cameron*, 50 Ala. 399.

There was no error in the charges given by the Circuit Court, and the judgment is affirmed.

Robinson v. Allison.

Statutory Action in nature of Ejectment.

1. *Testamentary power to executors to sell lands; how exercised, at common law.*—At common law, a naked power to sell lands, or to do any other act, given by will to persons named as executors, could only be exercised by the joint act of all, and did not survive; but, if the power was coupled with an interest, it was capable of execution by the executors who qualified, or the survivor of them; and if a power of sale was given

[Robinson v. Allison.]

to executors as such, and not *nominatim*, it might be exercised by the qualifying or surviving executor, unless the will expressly pointed to a joint execution. If there was a devise to executors by name, with directions to sell, the descent to the heir was intercepted, the title passed to the donees, coupling an interest with the power, and the power might be exercised by the executors who qualified, or the survivor of them; but, under a devise that executors should sell lands, the descent to the heir was not intercepted, no estate passed to the executors, and the naked power of sale conferred on them could only be exercised by the joint act of all.

2. *Same; under statutory provisions.*—To obviate the inconveniences found to result from these common-law rules, it is now provided by statute that, when lands are devised to several executors to sell, or a naked power of sale is given to them by will, the power may be exercised by those who qualify or are acting, the survivor or survivors of them (Code, § 2218); and in determining whether a power is naked (incapable of other than a joint execution), or may be executed by the qualified, acting or surviving executors, the intention of the testator, as collected from the whole will, must control, the power being construed with greater or less latitude with reference to that intent.

3. *Same; in this case.*—Where the testator appointed his widow, his son and his son-in-law as executors of his will, made a specific devise and bequest to his widow, devised and bequeathed all the residue of his estate to his widow and children, and added a clause in these words: "My youngest child having heretofore attained the age of twenty-one years, I do not desire that my estate, or any part of it, should be kept together any longer than may be necessary for a convenient and equitable division. I authorize my executrix and executors to sell any part of my estate, directed to be divided among my wife and children, if it be found necessary to effect an equitable division; and such sales may be made at either public or private sale, and upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof; good security being required of the purchasers for all deferred payments, and if lands be sold, liens to be reserved on the lands sold, to be conveyed to the purchaser by my executrix and executors, or such of them as may be in office as such." *Held*, that the will conferred a discretionary power to sell, which could only be executed by the joint act and concurrence of the executrix and executors, and could not be exercised by the sole executor who qualified.

APPEAL from the Circuit Court of Madison.

Heard before the Hon. H. C. SPEAKE.

This action was brought by Walter B. Robinson, against Martha Allison, to recover the possession of a certain lot or parcel of land in Huntsville, with damages for its detention; and was commenced on the 10th August, 1880. The defendant pleaded not guilty, the statute of limitations of ten years, and the erection of valuable improvements under adverse possession for more than three years; and the cause was tried on issue joined on these pleas. The plaintiff claimed the land under a conveyance executed to him by John O. Robinson, as the executor of the last will and testament of James B. Robinson deceased; and for the purpose of showing the said executor's power to sell and convey, he offered in evidence the last will and testament of said James B. Robinson, with the proof of its probate, and the grant of letters testamentary to said John O.

[Robinson v. Allison.]

Robinson, one of the persons therein named as executors. On motion of the defendant, the court excluded the will as evidence, holding that the power of sale conferred by it on the persons named as executors could not be exercised by said John O. Robinson alone, although he alone qualified as executor. This ruling of the court, to which the plaintiff excepted, and in consequence of which he was compelled to take a nonsuit, is now assigned as error.

JNO. D. BRANDON, for appellant.—The distinction between a devise to executors to sell, and a naked power of sale, is abolished by statute.—Code, § 2128. The effect of this statutory provision is to authorize the execution of a testamentary power of sale by the sole acting or surviving executor, or by an administrator with the will annexed, in all cases, except where a personal trust and confidence is reposed in the persons named as executors. Under the provisions of the will in this case, a sale was authorized, if necessary to effect an equitable division; and a sale for that purpose might have been asked by an administrator, if the will had contained no such provision. That the will creates a naked power, and does not repose a personal trust and confidence, to be exercised or not at the discretion of the persons named, see *Johnson v. Bowden*, 37 Texas, 621; *Morgan v. Galloway*, 1 Ohio, 104; *Evans v. Chew*, 71 Penn. 47; *Larned v. Bridge*, 17 Pick. 339; *Chandler v. Rider*, 102 Mass. 268; *Osgood v. Franklin*, 2 John. Ch. 17; Caines' Cases, 1-19; *Franklin v. Osgood*, 14 John. 553; *Woolbridge v. Watkins*, 3 Bibb, 350; *Taylor v. Benham*, 5 Howard, 233; *Foxworth v. White*, 72 Ala. 224; 2 Wms. Ex'rs, 859; *Clarke v. Parker*, 19 Vesey, 1; *Wells v. Lewis*, 4 Metc. Ky. 269.

HUMES, GORDON & SHEFFEY, *contra*, cited *Anderson v. McGowan*, 42 Ala. 285; *Tarver v. Haines*, 55 Ala. 503; *Perkins v. Lewis*, 41 Ala. 649; *Ex parte Dickson*, 64 Ala. 192.

BRICKELL, C. J.—This was a statutory real action for the recovery of possession of a house and lot situated in the city of Huntsville, in which the appellant was plaintiff, and the appellee defendant. The appellant claimed title from a sale and conveyance made to him by John O. Robinson, as executor of the last will and testament of James B. Robinson, deceased, without the order or decree authorizing it, of any court having jurisdiction. The will of said James B. bears date June 16th, 1876, and after his death was duly admitted to probate, on the 2d day of December, 1877. By the first item or clause thereof, specific devises of real estate and bequests of personal property are made to his widow. By the second item, the rest and resi-

[Robinson v. Allison.]

due of his estate, not required for the payment of debts, or for the expenses of administration, is devised and bequeathed to his widow and children, the children being required to account for advancements made to them. The fourth item of the will is in these words: "My youngest child having heretofore attained the age of twenty-one years, I do not desire that my estate, or any part of it, shall be kept together any longer than may be necessary for a convenient and equitable division. I authorize my executrix and executors to sell any part of my estate, directed to be divided amongst my wife and children, if it be found necessary to effect an equitable division; and such sales may be made at either public or private sale, and upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof; good security being required of the purchasers for all deferred payments, and if lands be sold, liens to be reserved on the lands sold, to be conveyed to the purchaser by my executrix and executors, or such of them as may be in office as such." By the seventh item, the testator nominated and appointed his wife, Frances T., his son John O., and his son-in-law, Jesse B. Shivers, as executrix and executors of the will. The said John O. alone qualified as executor; and it was in execution of the power contained in the fourth item, that he made to the appellant the sale and conveyance of the premises in controversy.

The case has been argued by counsel, and we shall so consider it, as presenting no other question than whether the executor qualifying could alone execute the power to sell lands, which is conferred by the fourth item of the testator's will upon the executrix and executors thereafter nominated and appointed.

1. It is clear that, at common law, a naked power given to persons named as executors, to sell lands, or to do any other act, would not survive; nor could it be executed, unless the persons upon whom it was conferred joined in the execution. But, if there was a power of sale, coupled with an interest, the power was capable of execution by surviving executors, or by such of them as qualified. Or, if there was a power of sale given to executors, "*qua* executors, and not *nominatim*," and the will did not expressly point to a joint execution, the power could rightfully be exercised by such as qualified, or by the surviving executors. Or, if there was a devise of lands to executors by name, with directions to sell, the descent to the heir was interrupted, and the freehold passed to the donee, coupling an interest with the power; and it was capable of execution by surviving executors, or by such as accepted the executorial duties and trusts. But a mere devise that executors should sell lands did not interrupt the descent to the heir,

[Robinson v. Allison.]

nor pass any estate to the executors. It was but a naked power of sale, and the co-operation of all was necessary to satisfy its express terms.—*Lucas v. Price*, 4 Ala. 679; *Patton v. Crow*, 26 Ala. 431; *Anderson v. McGowan*, 42 Ala. 285; *Tarver v. Haines*, 55 Ala. 503; *Mitchell v. Spence*, 62 Ala. 650.

2. To obviate inconveniences which were found to result from the strict rules of the common law on this subject, was the purpose of the statute, which declares that, where a naked power is by will given to executors, the survivor of them; or such as may qualify, or an administrator with the will annexed, may execute the power.—Code of 1876, § 2218. The statute, by its terms, is confined in operation to two classes of cases; the first is a devise of lands to the executors, with directions to sell; and the other is to a naked power of sale. In determining whether a power is a naked power, incapable of any other than a joint execution, or whether it may be executed by surviving executors, or by the executors qualifying, the intention of the testator, as it may be collected from the terms of the will, must control. In reference to that intent, the power is construed with greater or less latitude.—*Franklin v. Osgood*, 2 Johns. Ch. 1.

3. Looking at the whole will, the purposes for which the power of sale is conferred, the form and language in which it is expressed, the conclusion that the testator intended a discretionary power, in the exercise of which there should be the concurrence of the executrix and executors, seems irresistible. There is not an absolute and unqualified devise that there shall be a sale of the land. The sale is to be made only in the event it is “found necessary in order to effect an equitable division.” And it is to be made publicly or privately, “upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof.” Whether a necessity for a sale existed, it is manifest, is dependent upon the judgment and discretion of the executrix and executors—upon their ascertainment and determination of the fact, whether without it an equitable division could be effected amongst the legatees and devisees. And if it shall be determined that there shall be a sale, the terms of sale, and whether it shall be made publicly or privately, is committed to their judgment and discretion. If the sale is upon credit, a lien upon the lands for the payment of the purchase-money is to be reserved; and when the purchase-money is paid in full, the land is “to be conveyed to the purchaser by my executrix and executors, or such of them as may be in office as such.” Thus, the testator distinguished between the sale and the conveyance of the lands. The sale is to be made by all—by the executrix and executors; but the conveyance may be executed by such of

[Washington v. Timberlake.]

them as may be in office when the time for its making occurs.

The rule is clear and indisputable, that when a power to sell lands, or to do any other act, is conferred upon two or more persons, whether by name, or as executors, and it is dependent upon their judgment or discretion whether the act shall be done or not, the power conferred is a special trust or confidence; its exercise is a matter for the judgment or discretion of all, and without the concurrence of all the power cannot be exercised.

Woolridge v. Watkins, 3 Bibb, 349; *Tarver v. Haines*, 55 Ala. 502.

It is not difficult to conceive that the testator was willing to repose in the executrix, his wife, the executors, his son and his son-in-law, the power to determine whether a sale of lands was necessary to effect a division amongst his devisees, the mode and terms of sale, and yet unwilling to intrust so great a power to either of them solely. Their joint and concurring judgment and discretion he may have deemed the best assurance that the power would be justly and wisely exercised, and exercised only in the contingency expressed. That he contemplated the sale should be the joint act, the concurrence of the judgment of all, is apparent, when the last clause of the item of the will conferring the power is read, which distinguishes between the sale and the conveyance, expressly authorizing such of the executors as were in office to make the conveyance, and not conferring power upon them to make the sale. Taking this to be the true construction of the will, the sale by the acting executor was unauthorized and void, conferring no title upon the appellant.

The judgment is affirmed.

Washington v. Timberlake.

Action on Injunction Bond.

1. *Variance in description of bond.*—In an action on an injunction bond, brought by T. as sole plaintiff, the complaint averring that the condition of the bond was that the obligors “would pay plaintiff all such damages as he may sustain by the suing out of said injunction,” and that they have failed “to pay him the damages he has sustained;” a bond payable to B. and T. jointly, and conditioned to pay them the damages they might sustain, is not admissible as evidence, the variance being material and fatal.

2. *Injunction bond, with condition awkwardly expressed.*—An injunction bond, the condition of which is that, if the obligors shall pay the obligees “all damages they may sustain by the suing out of said injunc-

[Washington v. Timberlake.]

tion, if the same is dissolved, *then this obligation to remain in full force and effect*," though awkwardly expressed, is not void.

3. *Attorney's fees as damages*.—Attorney's fees, for services rendered in procuring a dissolution of the injunction, are not recoverable as damages in an action on the injunction bond, unless averred and claimed as special damages in the complaint.

4. *Recoupment, and set-off*.—A claim of recoupment springs out of the contract or transaction on which the action is founded; a set-off is in the nature of a cross action, and may be a separate and independent demand not connected with the original cause of action.

5. *Statute of limitations to plea of set-off*.—When a set-off is pleaded, and the statute of limitations is replied thereto, the statutory bar is to be computed, not to the commencement of the action, but to the time when the plaintiff's right of action accrued (Code, § 2996); and if the claim was then barred, it is not a "legal subsisting claim," and is not available as a set-off.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Henry Bunn and John P. Timberlake, against William Washington and Walter Rosser; was commenced on the 15th April, 1875, and was founded on an injunction bond, executed by said defendants (jointly with W. A. Austin, since deceased), and conditioned as follows: "Now, if the said Walter Rosser, William Washington and W. A. Austin, or either of them, shall pay the said Henry Bunn and John P. Timberlake all damages they may sustain by the suing out of such injunction, if the same is dissolved, *then this obligation to remain in full force and effect*." On the first trial of the cause, there was a verdict and judgment for the defendants, under the rulings of the court; but the judgment was reversed by this court on appeal, and the cause remanded, as shown by the report of the case.—*Rosser v. Bunn & Timberlake*, 66 Ala. 89-96. After the remandment of the cause, as the present record shows, the death of Bunn was suggested, and the cause was prosecuted to judgment in the name of Timberlake as sole plaintiff; and the pleadings were amended and changed, as shown in the opinion of the court. On the second trial, there was a verdict and judgment for the plaintiff; but numerous exceptions were reserved by the defendants to the rulings of the court on the evidence, and in the matter of charges given and refused; and these several rulings are now assigned as error. The material facts appear in the opinion of the court, in connection with the former report of the case and the brief of counsel.

HUMES & GORDON, and ROBINSON & BROWN, for appellants.
(1.) The bond offered in evidence ought to have been excluded, because there was a fatal variance between it and the allegations of the complaint.—*May & Bell v. Miller*, 27 Ala. 515;

[Washington v. Timberlake.]

McLendon v. Godfrey, 3 Ala. 181; *Ulrick v. Ragan*, 11 Ala. 529; *Forward v. Marsh*, 18 Ala. 645; *Jordan v. Roney*, 23 Ala. 758; *Smith v. Causey*, 28 Ala. 655; *Milton v. Haden*, 32 Ala. 30; *Fournier v. Black*, 32 Ala. 41; *Coal Mining Co. v. Brainard*, 35 Ala. 476; *Hunt v. Hall*, 37 Ala. 702; *Dickson v. Bachelder*, 21 Ala. 699. (2.) The condition of the bond, as expressed, is a repugnancy and absurdity, and renders the bond void.—*Steele v. Tutwiler*, 63 Ala. 368; *Copeland v. Cunningham*, 63 Ala. 394; *Hamner v. Hobbs*, 2 Stew. & P. 383; *Percival v. McCoy*, 13 Fed. Rep. 397, for October 10th, 1882; 2 Parsons on Contracts, 73–75. (3.) A demurrer was sustained to the count which claimed counsel fees as special damages, and there was no such claim or averment in the count on which the trial was had.—*Donnell v. Jones*, 13 Ala. 490; *Lewis v. Powell*, 42 Ala. 136. (4.) The sufficiency of the replication to the plea of set-off was tested by demurrer on the former trial, but this court held it insufficient; and a demurrer to it being interposed on the second trial, the court erred in overruling it.—*Rosser v. Bunn & Timberlake*, 66 Ala. 89. (5.) The rejoinder to the replication, to which a demurrer was sustained, was framed under the authority of *Hatchett v. Gibson*, 13 Ala. 587, which recognizes the right to recoup unliquidated damages, which would not be allowable as a set-off; and it is sustained by Sedgwick on Damages, 5th ed., 491. (6.) The court erred in its construction of the statute (Code, § 2996), when pleaded to a set-off. Under the decisions of this court before the adoption of the present statute, a legal subsisting demand was construed to mean a claim on which an action at law might be maintained (*McDade v. Mead*, 18 Ala. 214; *Shaw v. Yarbrough*, 3 Ala. 588); and the words in the present statute being so construed, a legal demand is available as a set-off, although an action on it might be defeated by a plea setting up the statute. The statute of limitations does not *kill* the claim, but, if pleaded, defeats an action founded on it.

STONE, J.—On the 15th day of April, 1875, the original complaint was filed in this cause, in favor of Henry Bunn and John P. Timberlake. This complaint was amended June 4th, 1881. In May, 1882, the demurrer to the complaint as amended was sustained, and leave granted to file an amended complaint, which was immediately done. The amended complaint makes no alteration of the original count, or its amendment, but consists in a single count, declaring on an injunction bond, payable to the register, in the sum of five hundred dollars, “with condition that defendants would pay plaintiff all such damages as he might sustain by the suing out of an injunction, if the same should be dissolved; and plaintiff avers that the condition of

[Washington v. Timberlake.]

said bond has been broken, in this, that said injunction has been dissolved, and defendants have failed to pay plaintiff the damages he has sustained." The count contains no further specification of damages. On the same day the original complaint was amended (June 4th, 1881), the death of Henry Bunn, one of the plaintiffs, was suggested, "and suit continued in name of other plaintiff." From that time forth, the suit stood in the name of Timberlake, as sole plaintiff. The trial was had on that count alone. So, when the amended complaint was filed (May 30, 1882), the name of Timberlake alone appearing as plaintiff, and that count containing no reference whatever to Henry Bunn, either as a party to the bond sued on, or as having any interest in the suit, we must treat the case as if the original count had been in the name of Timberlake alone. Nor is it averred any where in the pleadings that Bunn and Timberlake were partners. Thus construing the record, the count last filed, and on which the suit was tried, avers that the bond declared on bound the obligors to pay Timberlake all damages he might sustain by the suing out of the injunction, if the same was dissolved.

In support of his action, the plaintiff offered the injunction bond in evidence. It was objected to, as variant from the description given in the complaint. The condition expressed in the bond offered in evidence, is in the following language: "Now, if the said William Rosser, William Washington, and William A. Austin, or either of them, shall pay the said Henry Bunn and John P. Timberlake all damages they may sustain by the suing out of such injunction, if the same is dissolved," &c. The averment claims damages payable to one. The bond offered in evidence shows damages payable to two. This is such a variance as required the exclusion of the evidence.—*May v. Miller*, 27 Ala. 515; *McLendon v. Godfrey*, 3 Ala. 181; *Ulrick v. Ragan*, 11 Ala. 529; *Forward v. Marsh*, 18 Ala. 645; *Smith v. Causey*, 28 Ala. 655; *Milton v. Haden*, 32 Ala. 30; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; *Hunt v. Hall*, 38 Ala. 702.

2. Another objection is urged to the admissibility of the bond in evidence—namely, that the defeasance clause is repugnant to the obligation of the bond, and it is therefore worthless. The concluding clause of the defeasance is blunderingly expressed, but we do not think it avoids the bond. The bond is in the penalty of five hundred dollars, and binds the obligors, or either of them, to pay the said Bunn and Timberlake all damages they may sustain by the injunction, if the same is dissolved. The fault of the bond seems to be, that it leaves the obligors bound, notwithstanding they may pay all damages the

[Washington v. Timberlake.]

plaintiffs may sustain; in other words, that it has no defeasance clause.—*Copeland v. Cunningham*, 63 Ala. 394.

3. The testimony offered, of attorney's fees paid or incurred in obtaining a dissolution of the injunction, should not have been received. The complaint contained no averment to let in such evidence.—*Dothard v. Sheid*, 69 Ala. 135; *Pollock v. Gantt*, *Id.* 373.

4. There is no question of recoupment, shown either in the pleadings or evidence found in the record. Recoupment applies, when the abatement claimed springs out of the very contract, or transaction, on which the recovery is sought.—*Bouv. Law Dic.* It is entirely unlike set-off, which is in the nature of a cross action, and may rest on an independent legal demand, if that demand be of a class not sounding in damages merely. *Rosser v. Bunn & Timberlake*, 66 Ala. 89.

5. The remaining question is set-off, of a sum alleged to be due from Bunn and Timberlake to Rosser, the principal obligor, being the statutory penalty for knowingly and willfully cutting down and removing trees from the lands of Rosser, without his consent.—Code of 1876, § 3551. To this plea the plaintiff replied the statute of limitations of one year.—Code, § 3554. There was rejoinder to this replication, and demurrer to it, which require us to construe section 2996 of the Code of 1876. That section is in the following language: "When the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant, notwithstanding such replication, is entitled to have the benefit of his debt as a set-off, where such set-off was a legal, subsisting claim, at the time the right of action accrued to the plaintiff on the claim in suit."

Certain features of this statute are so clear, that they need no interpretation. The test-time is when the plaintiff's right of action accrued—not when he brought suit. The set-off, to be available, must be a subsisting cause of action at that time. Applying the principle to this case, the set-off must have been a subsisting demand, when the injunction was dissolved.

What is the meaning of the word *subsisting*, found in this statute? It is very true that the lapse of time prescribed in our statutes of limitation does not, *ex proprio vigore*, extinguish a moneyed demand. It is a defense the defendant may interpose or not, at his option. Failing to plead it, there will be a recovery, although the bar was complete before the action was commenced. So, a debt barred by statute is so far a legal, as contradistinguished from a moral obligation, as to uphold a promise afterwards made to pay it, if expressed in legal form. Code of 1876, § 3240. It is thus shown that a debt, against

[Memphis & Charleston R. R. Co. v. Whorley.]

which the statutory bar has run, is, in one sense, a *subsisting* demand.

We hold, however, that the word *subsisting*, as employed in the statute we are construing, has a more confined meaning, and that the precise object the legislature had in view was, that demands held by defendants when the adversary plaintiff's right of action accrued, if then free from the infirmity of age, should not afterwards lose their availability as a defense, by mere lapse of time. The following are some of the reasons in support of this interpretation. When parties have cross demands against each other, the real indebtedness is the excess of one debt over the other; and a debtor thus circumstanced has the option of suing on his demand, or of waiting till his adversary sues, and pleading his cross demand as a set-off. The statute comes in, in such case, and, in promotion of equality of right, permits the holder of the cross demand to hold it up until his adversary sues, and, in such conditions, does not compute time against him. If, however, the cross demand was barred when the plaintiff's cause of action accrued, it was not a *subsisting* demand within the meaning of this statute. Such is the clear implication of our ruling, in *Riley v. Stallworth*, 56 Ala. 481.

We need not apply these principles to the case before us. Some of the rulings of the Circuit Court are not in harmony with these views.

Reversed and remanded.

Memphis & Charleston Railroad Co. v. Whorley.

Garnishment on Judgment; Amendment of Judgment nunc pro tunc.

1. *Amendment of judgment against garnishee, nunc pro tunc, by reciting judgment against defendant.*—Re-affirming the decision made in this case at the last term, the court holds that, in the entry of a final judgment against a garnishee, it is the duty of the clerk to make it recite the fact and amount of the original judgment against the debtor; and that his failure to do so is a clerical error, which may be corrected by amendment, *nunc pro tunc*, at a subsequent term.

2. *Same; when appeal lies.*—Although the rendition or amendment of a judgment *nunc pro tunc* is the correction of a mere clerical error or misprision, an appeal lies from the order or judgment allowing it.

3. *Judgment against corporation; service of process on agent, or answer as garnishee by agent.*—A judgment by default against a corporation

[Memphis & Charleston R. R. Co. v. Whorley.]

must show that proof was made of the agency of the person upon whom the process was served; and by statutory provision (Code, § 3222), an answer for a corporation as garnishee can not be made by any person, "unless he shall make affidavit that he is the duly authorized agent of such corporation to make such answer."

4. *Same; waiver of defective service or answer by appearance.*—Although the answer of the agent is not accompanied with the prescribed affidavit, the defect is waived by the subsequent appearance of the corporation, recognizing his authority to answer for it; and the recitals of the record in this case, as to the appearance of the parties by attorney, and continuances by consent, affirmatively show such appearance by the corporation.

APPEALS from the Circuit Court of Limestone.

Tried before the Hon. H. C. SPEAKE.

These two appeals are parts of one and the same case, and were argued and submitted together. The records show that, at the April term of said Circuit Court, 1874, a judgment by default was rendered in favor of J. & L. Whorley, suing as partners, against William Greet, and a writ of inquiry as to damages was awarded; and on the execution of the writ, at the next term, the damages were assessed at \$195.47. On the 29th September, 1877, a garnishment was sued out on this judgment against the Memphis & Charleston Railroad Company, as the debtor of said Greet; and the writ was returned by the sheriff, "Executed by serving copy of the within writ on Ed. Norvell, agent of the within named M. & C. R. R. Co." On the 22d October, 1877, an answer was filed in the name of the garnishee, by "John Bradley, paymaster," which was sworn to before a notary public in Tennessee; admitting an indebtedness to said Greet, at the service of the garnishment, of \$162.50, and concluding as follows: "John Bradley makes oath that he is paymaster of said Memphis & Charleston Railroad Company, and is familiar with the facts stated in the foregoing answer; that it is in the line of his duty, as such paymaster, to keep and state the account of said William Greet with said company, and of all other persons in the employment of said company, and that the statements of the foregoing answer are true." On a subsequent day of the October term, 1879, Greet filed a declaration of exemption, under oath, as to the debt due to him by the garnishee; and at the ensuing May term, 1878, he filed a special plea, denying the legal sufficiency of the garnishee's answer to support a judgment, "because said Bradley has failed to make affidavit that he is the legally authorized agent of said corporation to answer for it as garnishee." The record does not show any action by the court on this claim of exemption, or on this special plea. At the May term, 1879, a judgment was rendered against the garnishee, in these words: "Came the parties, by their attorneys, and the garnishee answers indebtedness to the defendant in the sum of \$162.50; it

[Memphis & Charleston R. R. Co. v. Whorley.]

is therefore considered by the court that the plaintiffs have and recover of the said garnishee, the Memphis & Charleston Railroad Company, the said sum of \$162.50, and that the plaintiffs recover of said defendant the costs of this garnishment." From this judgment the garnishee sued out an appeal to this court, here assigning as error that the court had no jurisdiction to render judgment against said garnishee, because there was no service of process on said corporation, and no answer by the corporation or any lawful agent; and that said judgment failed to recite or show any judgment against Greet, the original debtor and defendant.

While said appeal was pending in this court, the plaintiffs made a motion in the court below to amend their judgment against the garnishee, *nunc pro tunc*, by reciting in it the fact of the rendition of judgment against Greet, and the amount of said judgment. On the first trial of this motion, the court below excluded the evidence offered by the plaintiffs, and refused to allow the proposed amendment; but its judgment was reversed by this court on appeal, at the last term, and the cause was remanded.—*Whorley v. M. & C. Railroad Co.*, 72 Ala. 20. On the second trial of the motion, as the bill of exceptions in the present record recites and shows, the garnishee opposed the proposed amendment, on these grounds: 1st, that the judgment sought to be amended had been set aside by the court, on motion of the garnishee; 2d, that said judgment was rendered without any service of process on said corporation, and without any appearance or answer by it, and was a nullity; 3d, that the defendant's affidavit and claim of exemption was still pending and undetermined, never having been acted on by the court; 4th, that said defendant had been declared and adjudicated a bankrupt. The plaintiffs offered in evidence, in support of their motion, the original judgment against Greet, and the garnishee objected to its admission, on these grounds: "1st, because it is *res inter alios acta*; 2d, because it is an attempt now to supply the evidence of that judgment which had not been offered, or attempted to be proved, when the judgment against said garnishee was rendered; 3d, because said evidence is illegal, irrelevant, and incompetent." The court overruled these several objections, and admitted the judgment as evidence; to which the garnishee duly excepted. The plaintiffs then offered in evidence the affidavit for the garnishment, the writ of garnishment, with the return thereon indorsed, and the answer filed by Bradley in the name of the garnishee; to each of which the garnishee objected, "on the same several grounds above assigned to the admission of said judgment," and duly excepted to the overruling of each objection, and to the admission of said papers as evidence. The plaintiffs offered in evidence, also, the continu-

[Memphis & Charleston R. R. Co. v. Whorley.]

ances entered in the cause at the November term, 1877, and the May term, 1878, each of which was in these words: "Came the parties by attorney, and by consent this cause is continued;" the title of the case being thus entered in the marginal statement of the parties' names: "*J. & L. Whorley v. M. & C. R. R. Co.*, garnishee of William Greet." The garnishee objected to the admission of these entries as evidence, on the same grounds as above specified in relation to the other evidence, and duly excepted to the overruling of said several objections.

The garnishee then offered in evidence a judgment rendered in said cause by the court, at its November term, 1881, setting aside the judgment which had been entered up on the answer filed in its name. This judgment was in these words: "In this cause, upon the motion of the Memphis & Charleston Railroad Company, as garnishee in the cause, to amend *nunc pro tunc* the judgment-entry against it made at the Spring term of this court, 1879, and to vacate and annul the judgment entered up against it at said term; it appearing to the satisfaction of the court, on the trial of said motion, that said Memphis & Charleston Railroad Company, as garnishee, never appeared in the cause, by attorney or otherwise, and the said judgment-entry in said cause, whereby it appeared that the parties came by attorney, was erroneous and incorrect, in this, that said garnishee never did appear in this court, by attorney or otherwise; and it further appearing that the judgment entered in said cause at said term, in favor of the plaintiffs, and against said garnishee, for \$162.50, was rendered upon a paper writing in this cause, indorsed by the clerk as filed on the 22d October, 1877, and purporting to be the answer of said garnishee, made by John Bradley; and it further appearing to the satisfaction of the court that no judgment could be entered up against said garnishee on said paper writing as the answer of said garnishee, and therefore said judgment was without authority of law; it is therefore considered by the court, that said motion of said garnishee be granted—that said judgment-entry be annulled [*amended* ?], so as to show that said garnishee did not appear by attorney, and that said judgment against said garnishee was rendered upon said paper writing signed and sworn to by said Bradley; and that said judgment against said garnishee be, and the same is hereby, set aside and held for naught, and said cause be restored to the docket, for proceedings to be had therein as if no such judgment had ever been rendered; and it is further considered that the said garnishee recover of the plaintiffs the costs of this motion."

"The plaintiffs objected to the introduction of said judgment as evidence; the court sustained their objection, and the garnishee excepted. And this being all the evidence offered on said

[Memphis & Charleston R. R. Co. v. Whorley.]

trial, the court thereupon granted plaintiffs' motion, and amended the judgment against said garnishee as prayed for in said motion; to which action and ruling of the court said defendant (garnishee) duly excepted."

From this judgment the garnishee appealed, and here assigns the same as error, together with the several rulings of the court on the evidence to which, as above stated, exceptions were reserved. A motion was submitted by the appellees, to dismiss this appeal, on the ground that the amendment was not such a judgment as would support an appeal. The amended judgment was brought up, in return to a special *certiorari*, as a part of the record in the first appeal.

HUMES, GORDON & SHEFFEY, for the appellant in each case. (1.) The court was not authorized to render any judgment against the garnishee, on the answer filed by Bradley, in the absence of the affidavit which the statute makes a condition precedent to the validity of such answer.—Code, § 3222; *M. & E. Railroad Co. v. Hartwell*, 43 Ala. 508. (2.) The appearance of the garnishee can not supply the want of the affidavit, and the recitals of the judgment do not show an appearance by the garnishee: on the contrary, while the plaintiffs and defendant each appeared by attorney, and their respective pleadings are signed by their attorneys, there is no pleading on file signed by an attorney for the garnishee; and the recital as to the appearance of *the parties* by attorney, must be referred to the parties who were in court.—*Hunt v. Ellison*, 32 Ala. 182; *Kingsbury v. Yniestra*, 59 Ala. 320; *Thompson v. Whitman*, 18 Wallace, 457. (3.) The judgment against the garnishee is erroneous, because it does not recite or show that any judgment had been rendered against the defendant in the original cause. *Chambers v. Yarnell*, 37 Ala. 400; *Bonner v. Martin & Lowe*, 37 Ala. 83; *Faulks v. Heard & Due*, 31 Ala. 517; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *So. Express Co. v. Carroll*, 42 Ala. 437; *Railroad Co. v. Hartwell*, 43 Ala. 508. (4.) The judgment being void, it was properly set aside at a subsequent term.—*Wainwright v. Sanders*, 20 Ala. 602; *Summersett v. Summersett*, 40 Ala. 596; *Bryan v. Streeter*, 57 Ala. 104. (5.) The defects of the judgment could not be remedied by an amendment *nunc pro tunc*. The omission of the judgment against the original defendant was not a clerical misprision, but a fatal defect of proof, which neither the clerk nor the court could supply; nor could the proof be supplied by the party at a subsequent term, when it was not shown, nor attempted to be shown, that the proof was in fact made to the court when the judgment was rendered.—*Benford v. Daniels*, 13 Ala. 667, *Burt v. Hughes*, 11 Ala. 571; *Wolfe v. Davis*,

[Memphis & Charleston R. R. Co. v. Whorley.]

74 N. C. 597. A garnishment is the institution of a new suit; and though it be consequential to the original suit, the judgment against the original defendant is no part of the record, unless made so in proper manner.—Drake on Attachments, § 452; *Pearce v. Winter Iron Works*, 32 Ala. 72. The appellant asks a re-examination of this point by the court, and relies on the authorities cited in brief for appellee on former appeal.—72 Ala. 21.

MCCLELLAN & MCCLELLAN, *contra*.—(1.) The defects of the original judgment were cured by the amendment, and the amended judgment is made part of the record.—36 Ala. 604. On the first appeal, then, the judgment must be affirmed, as the assignments of error are now without foundation in fact. (2.) The defects of the answer can not be looked to, in the present state of the record; and if they could, the defect is cured by the appearance of the garnishee, as shown by the recitals of the judgment-entries.—24 Ala. 480; 29 Ala. 454; 32 Ala. 173; 10 Peters, 449; 4 Wait's Actions & Defenses, 196. (3.) The amendment of the judgment was made in strict accordance with the former decision of the case.—72 Ala. 20. (4.) It is submitted that no appeal lies from such amendment, it being merely the correction of a clerical misprision.

SOMERVILLE, J.—These two causes were submitted in connection, the one being an appeal from a judgment against the appellant as garnishee, and the other a subsequent appeal from the same judgment, as amended *nunc pro tunc*.

When the cause was last before us for consideration, it was held that the judgment-entry against the garnishee could be amended at a subsequent term, *nunc pro tunc*, so as to make it recite the amount of the original judgment against the debtor, which had been omitted by clerical misprision.—*Whorley v. Memphis & Charleston R. R. Co.*, 72 Ala. 20. The amendment having been made in accordance with the ruling in that case, we are requested to review the conclusion at which we then arrived. We have done so, and are of opinion that the case should be adhered to, as being in harmony with our past decisions touching the subject of amendments of this nature. *Taylor v. Harvell*, 65 Ala. 1, 15; *Nabers v. Meredith*, 67 Ala. 833; *Wilkerson v. Goldthwaite*, 1 St. & Port. 159; *Evans v. St. John*, 9 Port. 186; 1 Brick. Dig. p. 78, §§ 129 *et seq.*

There can be no doubt of the fact, that an appeal will lie from the judgment rendered, or amended, *nunc pro tunc*, and that the judgment of the court sustaining the motion to amend may be made a ground for the assignment of error. The appeal is not taken, as supposed by appellee's counsel, from the

[Memphis & Charleston R. R. Co. v. Whorley.]

act of the clerk making the correction, which is merely ministerial; but it is from the judgment of the court, under authority of which the clerk has done the act.—*Ex parte Gilmer*, 64 Ala. 234; *Lilly v. Larkin*, 66 Ala. 110; 1 Brick. Dig. 78, §§ 129 *et seq.*

It is insisted that the answer of Bradley, which purports to be in the name of the Memphis & Charleston Railroad Company, is insufficient to sustain the judgment rendered against the company as garnishee, because it does not appear that he had any authority to make the answer. Our decisions are very clear in holding that a judgment by default against a corporation can not be sustained by the sheriff's official return, or even the clerk's statement, characterizing the person upon whom the summons and complaint were served as *agent* of the corporation. It must appear from the record that satisfactory *proof* of such agency was made in the court below, showing that the person, upon whom such process was served, occupied such a relation to the defendant corporation, as to bring the defendant into court, within the provisions of the statute authorizing service on certain designated agents.—*Southern Express Co. v. Carroll*, 42 Ala. 337; *Talladega Ins. Co. v. McCullough*, *Ib.* 667; *Oxford Iron Co. v. Spradley*, *Ib.* 24; *M. & E. Railroad Co. v. Hartwell*, 43 Ala. 508. So, for a like reason, the statute which authorizes process of garnishment to issue against private corporations, provides that no person shall answer such process in behalf of such corporation, "unless he shall *make affidavit* that he is the *duly authorized agent of such corporation to make such answer*."—Code, 1876, § 3222. The answer of Bradley fails to comply with this statute.

Conceding that this position is well taken, its force becomes totally unavailing, as is admitted in argument, provided there has been an appearance in the court below by the garnishee. This would constitute an affirmance of the agent's authority to make the answer, and would be a waiver of any defect in the process by which the garnishee was brought into court. It is not necessary that we should consider the question, argued by appellant's counsel, as to whether the judgment-entry against the garnishee shows such appearance. This precise question is discussed in *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 173, where all the authorities are collated, with a conflict of opinion among the judges who sat in the cause. It is enough for us to say, that the several judgment-entries, showing repeated continuances of the garnishment cause, recite the fact that "*the parties came by attorney*," and that this clearly constitutes a general appearance by the garnishee, especially in view of the statement that these continuances were *by consent*.—*Hunt v. Ellison*, 32 Ala. 173, *supra*; *Collier v. Falk*, 66 Ala. 223.

[Coffey v. Joseph.]

These entries were a part of the record of the cause, and, as such, were properly admitted as evidence of an appearance by the garnishee, in the proceedings taken to amend the judgment *nunc pro tunc*, in the court below.

We can see no error in the record, and the judgment in each case is affirmed.

Coffey v. Joseph.

Petition by Widow for Allotment of Homestead; Contest by Mortgagee as Creditor.

1. *When appeal lies.*—When the widow's claim to a homestead exemption is contested by a creditor of her deceased husband, and the contest is removed into the Circuit Court for trial, an appeal to this court does not lie from the judgment of the Circuit Court (Code, § 2841), but must be taken from the subsequent judgment of the Probate Court; and an appeal taken from that court, before any subsequent proceedings are had, will be dismissed.

2. *Widow's right of homestead exemption; who may contest.*—When a widow files her petition in the Probate Court, claiming and asking the allotment of a homestead in the lands of her deceased husband, her right may be contested by the personal representative of the husband, or by any person in adverse interest (Code, § 2841); but the object and purpose of the statutory contest is to separate the homestead lands from the lands subject to administration, and the title is not involved; nor can a mortgagee propound his interest, and try the validity and priority of his mortgage as against the widow's claim of homestead, either in the Probate Court, or in the Circuit Court on certificate from the Probate Court.

APPEAL from the Probate Court of Jackson.

The record in this case shows that, on the 13th June, 1881, Mrs. Polly Ann Joseph, as the widow of Julius Joseph, deceased, filed her petition in said Probate Court, asking that a parcel of land in the town of Stevenson, containing about eight acres, and alleged to be of the value of about \$300, of which her said husband died seized and possessed, be set off and allotted to her and her minor children as their homestead exemption; that the petition came on for hearing on the 22d July, 1881, when the court appointed three commissioners to set apart and allot to the petitioner and her children the said land, or so much thereof as they might be entitled to, but reserved "all other questions touching the matter until the coming in of said report;" that on the 30th September, 1881, before the commissioners made their report, Rice A. Coffey filed his petition in said court, propounding his interest in the lands under a mortgage which purported to be executed by said Julius

[Coffey v. Joseph.]

Joseph and his wife, and asking that he be made a party, in order that he might contest the widow's claim of homestead; that the commissioners made their report on the 5th October, 1881, allotting to the widow the lands which she claimed; and that on the 17th October, the court made an order which, after reciting these proceedings, continued thus: "And it appearing to the court that said Rice A. Coffey is a person in adverse interest, and exceptions having been filed within the time allowed by law; it is considered by the court, that said R. A. Coffey be, and he is hereby, made a party defendant to this proceeding, and authorized to propound his interest in the same. And the petitioner having joined issue on the objections and exceptions filed by said Coffey, and it appearing after due consideration that said exceptions are to the allotment of a homestead in said lands, and not merely to the allowance of said claim, it is ordered by the court, that the issue so formed be certified to the next term of the Circuit Court of said county, for such proceedings thereon as the law directs."

In the Circuit Court, as the bill of exceptions recites, the plaintiff having offered in evidence the transcript certified from the Probate Court, "the defendant and contestant then admitted, that said petitioner was the widow of said Julius Joseph, deceased, and that said Joseph was living on the said lands at the time of his death, and was occupying said lands as a homestead at and before the execution of the mortgage to said defendant; and on these admissions being made, plaintiff closed her evidence, and the said defendant then offered in evidence" his mortgage, testifying as a witness for himself to its execution by said Joseph and his wife. "The plaintiff's counsel objected to the introduction of said mortgage as evidence, because the acknowledgment was not in the form prescribed by law for alienation of homesteads. The defendant's counsel insisted, that the acknowledgment was in proper form, and that the issue presented by plaintiff's objection was not within the issues presented by the record certified from the Probate Court. The court sustained the objection of plaintiff's counsel, held that the acknowledgment to the mortgage was not sufficient, and excluded said mortgage as evidence for that reason; to which ruling the defendant duly objected and excepted. There being no further evidence in the cause, the court rendered judgment in favor of the complainant, and against the defendant, sustaining the complainant's claim of homestead, and taxing the defendant with the costs of the contest. The defendant then prayed an appeal from said judgment, direct to the Supreme Court, which the court refused to grant; and the defendant thereupon objected and excepted. The court then certified said judgment back to the Probate Court, with instructions to grant the de-

[Coffey v. Joseph.]

fendant an appeal from said Probate Court to the Supreme Court, on the judgment and record of said cause from the Circuit Court; to which the defendant objected and excepted, but reserved the right to take such appeal from the Probate Court, as directed by said Circuit Court."

The record does not show any subsequent judgment or decree of the Probate Court. The certificate of appeal is signed by the judge of probate, but does not describe the judgment from which the appeal is taken. The judgment of the Circuit Court, and its rulings to which exceptions were reserved, are now assigned as error.

ROBINSON & BROWN, for appellant.

R. C. HUNT, *contra*.

BRICKELL, C. J.—The appeal must be dismissed. The only judgment or decree found in the record, having any of the properties of a final judgment or decree, is the judgment of the Circuit Court rendered on the contest of the right of homestead claimed by the widow and minor children, certified from the Court of Probate. That judgment, the statute (Code of 1876, § 2841) seems to intend, shall not be the subject of an appeal, but that an appeal shall lie only from the decree rendered in the Court of Probate, on the subsequent proceedings which it is contemplated shall be had. If such proceedings were had, and a decree rendered, they are not disclosed in the present record.

The proceedings in the Court of Probate, and the subsequent proceedings in the Circuit Court, were statutory. The jurisdiction of each court over the subject-matter is derived from the statute, which prescribes the course of proceedings, and limits and bound the jurisdiction. The jurisdiction is to hear and determine the validity of a claim of the widow, or of the minor children, to a homestead; and if the homestead is assigned by commissioners appointed by the judge of probate, whether the valuation fixed by the commissioners be just, or whether the real value of the land assigned is in excess of the exemption allowed by law. The contest of the claim of exemption, or of the valuation fixed by the commissioners, may be instituted by the personal representative, or by any party "in adverse interest." The whole purpose is to ascertain the lands subject to administration, separating them from the lands the widow or minor children can rightfully hold as homestead. The title to the lands is not involved; nor is the inquiry involved, whether there are outstanding incumbrances, to which the homestead right is subordinate. The homestead is carved

[Vincent v. The State.]

out of the estate of the deceased husband, or father, and may exist in any lands, in which he had a legal or equitable interest, attended with occupancy at the time of his death.—Thompson on Homestead, §§ 170-73; *Weber v. Short*, 55 Ala. 311; *McGuire v. VanPelt*, *Id.* 344.

Whether the mortgage to the appellant is valid and operative, was not the subject of determination in this proceeding. If it be valid, the widow and minor children were, nevertheless, entitled to a homestead in the lands, continuing until there was a foreclosure. If it be not valid and operative, the homestead can not be defeated by it. As well could the mortgagee have gone into the Court of Probate with an action of ejectment for the recovery of possession, or a bill to foreclose, as to have instituted a contest of the right of homestead, under the statute, upon the ground that his estate as mortgagee was superior to the right of homestead. The statute confers no jurisdiction upon the Court of Probate, or the Circuit Court upon a certificate from the Court of Probate, to entertain such a contest. The statutory jurisdiction is limited and confined to the inquiry, whether the lands in which homestead is claimed were, at the death of the husband and father, impressed by his occupancy with the character of a homestead, as occupancy is defined by the statute, and whether the assignment made by the commissioners is in value excessive. It does not authorize a trial of disputed titles to land.

We do not pass upon the sufficiency of the certificate of the wife's acknowledgment of the execution of the mortgage. That question, upon this appeal, lies as completely without our jurisdiction, as it was without the jurisdiction of the Court of Probate, or of the Circuit Court.

Appeal dismissed.

Vincent v. The State.

Bill in Equity to set aside Fraudulent Conveyances.

1. *Voluntary conveyance; validity as against creditors, and burden of proof as to consideration.*—A person who is indebted, or on whom rests a legal liability, can not make a gift, or voluntary conveyance of property, which will be upheld against such pre-existing debt or liability; and when the creditor seeks to reach, and condemn the property so conveyed, the *onus* is on the grantee to show that the conveyance is supported by a sufficient valuable consideration.

2. *Conversion of wife's property by husband.*—If the husband converts

[Vincent v. The State.]

the *corpus* of his wife's statutory estate, either by investing it in property in his own name, or by otherwise using it for his own purposes, he thereby becomes indebted to her, and may convey to her, in payment of such indebtedness, either the property so purchased, or other property of value not materially disproportionate; but this principle does not extend to the income and profits of the funds or property so used and converted, as to which he is under no obligation to account to the wife, her heirs, or legal representatives (Code, § 2706), and which will not support a subsequent conveyance to the wife as against his prior creditors.

3. *Renunciation by husband, of right to income and profits of wife's property.*—The court will not affirm that the husband may not renounce, in favor of the wife, his statutory right to control and dispose of the income and profits of the wife's statutory property, or invest them primarily for her benefit; but such renunciation, to prevail against the claims of his creditors, must be made before the income accrued, or before it was used or invested.

4. *Declarations; when admissible as part of res gestæ.*—Declarations made by parties contemporaneously with a contract, and shedding light thereon, are admissible evidence as a part of the *res gestæ*; as also are declarations made by a person who is in possession of property, explanatory of his possession, or in disparagement of his title; but his declarations as to the source from which his title was derived, or merely narrative of past transactions, do not fall within this principle.

5. *Exemptions; against what debts available.*—The claim of the State against a defaulting public officer is both a tort and a crime, and no exemption of property can be claimed or allowed against it.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed on the 1st June, 1883, in the name of the State of Alabama as complainant, against Isaac H. Vincent, late treasurer of the State, his wife and children, and several other persons; and sought, principally, to set aside certain conveyances of property to Mrs. Vincent, made or procured to be made to her by her husband, on the ground that they were without consideration, and were fraudulent as against the complainant's claim against said Vincent on account of his defalcation as treasurer; and to subject the property to the satisfaction of the amount which might be found due to the complainant, on the statement of Vincent's accounts as treasurer. The property consisted of two houses and lots in the city of Montgomery, one situated on the corner of Lawrence and Washington streets, and the other on Court street. The property on Washington street was conveyed to Mrs. Vincent by V. M. Elmore, as register in chancery, by deed dated June 20th, 1881, which recited as its consideration the payment of \$1,500, and a copy of which was made an exhibit to the bill. As to this deed, the bill alleged, "that the money used in paying for said lot was not the money of the said Adelia C. Vincent, but was given to her by her said husband at the time of the sale; that although said deed recites that the purchase-money was paid by the said Adelia, such was not the fact, and the same was actually paid by said I. H. Vincent, out

[Vincent v. The State.]

of moneys belonging to the State or to himself; that the execution of said deed to Adelia was without any consideration proceeding from her, and was a fraud upon the State, and the same is null and void as against the claim of the defendant." The house and lot on Court street, which was the residence of said Vincent and his family, was bought by him at a sale made by the register in chancery at Montgomery, at the price of \$7,000 cash, and conveyed to him by deed dated 11th July, 1881; and he conveyed this property to his wife, by deed dated January 10th, 1883, therein reciting the consideration as follows: "Whereas I have heretofore received from my wife, C. A. Vincent, the sum of \$4,500 belonging to, and forming part of the *corpus* of her statutory estate, and have used the same in the purchase of, and payment for the property hereinafter described, and have taken the title thereto in my own name; and whereas said purchase was really made for the benefit, and on account of my said wife; now, therefore, in consideration of the premises, and for the further consideration of \$2,000 to me in hand paid by the said C. A. Vincent, the receipt whereof is hereby acknowledged," &c. The bill alleged that these recitals, "each and all, are untrue; that there was in truth no consideration whatever for said deed, and said conveyance was purely voluntary, and without any valuable consideration, and was and is wholly null and void as against the complainant's claim; that said Vincent had not, up to that time, received any moneys or property belonging to his said wife, and was not indebted to her at all; that he never at any time received any money belonging to his said wife, except a small sum, not exceeding \$1,500, which was received at or about the time of their marriage in 1874, and had all been expended in the support of his said wife and children, by and with her consent, long prior to the election of said Vincent to said office of treasurer."

In addition to the real estate above described, there were twenty shares of stock in the Commercial Fire Insurance Company, which were standing in the name of Vincent's two infant sons, and which the bill sought to have subjected to the satisfaction of the complainant's demand against him on account of his defalcation; and there were debts due to him from the other defendants to the bill, which it sought to subject to the satisfaction of said claim; but, as the case is here presented, these matters require no special notice. As to the complainant's claim against Vincent, the bill alleged that, in August, 1878, he was elected treasurer of the State, and entered on the discharge of the duties of said office on the 25th November, 1878; that he was re-elected in August, 1880, and again qualified, and continued to discharge the duties of the office until

[Vincent v. The State.]

on or about the 30th January, 1883, when he absconded, leaving his accounts as treasurer unsettled, and a large balance due to the State; that during his first term of office he illegally and fraudulently abstracted and converted to his own use a large sum of money, to-wit, \$50,000, of moneys belonging to the State which had come into his hands as treasurer; that during his second term of office, and between the 1st December, 1880, and the 31st January, 1883, he illegally abstracted, and wrongfully and fraudulently converted to his own use, another large sum of money, to-wit, \$250,000; that these several sums were not abstracted and converted at one time, but at different times during the terms aforesaid, and the amounts so abstracted and converted prior to May 1st, 1881, aggregated \$150,000. The bill alleged, also, that on the 1st February, 1883, the complainant commenced suit by attachment against Vincent, on account of his defalcations as treasurer, and had writs of attachments levied on all the property described in the bill, and served writs on the several defendants who were supposed to be indebted to said Vincent; and prayed an account against Vincent, a decree declaring the conveyances to Mrs. Vincent fraudulent and void as against the complainant, and subjecting the property, with the certificates of stock and the debts attached, to the satisfaction of the amount ascertained to be due to the complainant.

An answer on oath to the bill was waived as to Mrs. Vincent, but she was required to answer the interrogatories attached to the bill on oath; and she so answered, but her answers to the interrogatories are not material to the case as here presented. She alleged that she and her husband were married in Autauga county, Alabama, on the 29th January, 1874; that her distributive share of the estate of her father, John Merritt, then deceased, amounting to the sum of \$2,296.46, was received by her husband at different times, and was not used or converted by him to his own purposes, but was lent out at high rates of interest, until principal and interest amounted to \$4,500, which was used by him in paying for the house and lot on Court street; that this property was bought by him as a home for her and her children, and was intended as an investment of her said funds; that the conveyance by the register was taken by mistake in the name of her husband, and that in January, 1883, on the first discovery of the mistake, her husband executed to her a deed to the property, as shown by the conveyance dated January 10th, 1883; that her husband received other moneys, at different times, belonging to her statutory estate, which were not expended by him in the support and maintenance of his family; and she claimed the benefit of all exemptions to which she might be entitled under the constitution and, laws of Ala-

[Vincent v. The State.]

bama. The certificates of stock in the insurance company, each for ten shares of \$100 each, were dated respectively May 22d, and July 12th, 1881, were in favor of "Isaac H. Vincent, trustee," and were in Mrs. Vincent's possession; and as to them she answered, that they were held in trust for her two infant children, and that she did not know with what funds they were purchased, but denied that they were liable for the complainant's claim against Vincent. A formal answer was filed by the guardian *ad litem* of the infants, requiring proof of the allegations of the bill, and submitting their rights to the protection of the court.

The complainant took the depositions of Robert Goldthwaite, cashier of the Merchants & Planters' Bank in Montgomery, and of T. L. Gilmer, book-keeper and teller in the private banking-house of F. Wolffe in Montgomery, who testified, in substance, that the sum of \$20,000, part of a larger sum deposited in said M. & P. Bank by the tax-collector of Montgomery county, to the credit of said Vincent as treasurer, was drawn out by him on the 10th March, 1881, and used in "cotton transactions for future delivery" through the banking-house of said F. Wolffe; and the complainant submitted the cause on these depositions, together with a certified statement of Vincent's accounts as treasurer, made out by J. M. Carmichael, the auditor of public accounts, in February, 1883, after Vincent had absconded. The defendants filed objections to the competency and admissibility of this statement, but the record does not show that the court acted on them.

The depositions of Mrs. Vincent, A. D. Crawford, W. B. Shapard, J. M. McNamee, and T. B. Wilkinson, were taken by the defendants, and were offered in evidence by them. Mrs. Vincent testified, that her husband received her distributive share of the estate of her deceased father, amounting to about \$2,000, and afterwards told her, "on several occasions, that he had lent it out at good interest, and had made a good deal on it;" and as to the Court street property she thus testified: "When my husband handed me the deed for this property, on the 10th January, 1883, he told me that the money paid was my money; that he had invested my money in the place, as a home for me and my children. When he bought the place, he told me that he had bought it with my money, but that the deed had been made to him, instead of to me, as it should have been made, and that he would make a deed to me as soon as he finished paying for the place." The complainant filed objections to these portions of her testimony, but the record does not show that the court acted on them. Crawford was a clerk in the treasurer's office under Vincent, and he testified, in answer to cross-interrogatories by the complainant, that he first

[Vincent v. The State.]

discovered a *deficit* in Vincent's accounts at the close of October, 1882, amounting to about \$200,000, and called Vincent's attention to it. Shapard and McNamee were bankers in Opelika, and they testified to Vincent's business transactions with them during the years 1871-74, during each of which years he deposited with them, at different times, about \$2,000, and in 1879 about \$900; that he bought \$200 of stock in the Commercial Fire Insurance Company, in July, 1881, and that he was a man of small pecuniary means while he resided in the neighborhood of Opelika. T. B. Wilkinson thus testified as to a conversation he had with Vincent at the register's sale of the Court street property: "He asked me not to run the house up on him, if I did not particularly want it, as he wanted to buy it for his wife. He said that his wife had some money when he married her, and he had been buying State money with it, known as 'Horse-shoe money;' that it then amounted to \$4,000, or \$4,500, I can't remember which, and that his wife was very anxious for him to buy a home with it." The complainant filed objections to this evidence, but the record does not show that the court acted on them. It was admitted that the amount received by Vincent, as his wife's distributive share of her father's estate, as shown by a transcript from the Probate Court of Autauga, was \$2,226.15; and it was proved that, of the money used in the purchase of the certificates of stock, \$100 belonged to his infant sons.

The cause being submitted for decree on pleadings and proof, the court found and decreed, that Vincent was indebted to the complainant, on account of moneys received as treasurer and converted to his own use, on the 10th March, 1881, in the sum of \$20,000, and at the end of October, 1882, in the sum of \$200,000; that all subsequent gifts by him, and voluntary conveyances of property, were void as against the complainant; that no exemption could be claimed or allowed against this indebtedness, as it originated in a tort; that \$2,226.15 of Mrs. Vincent's money was used by her husband in the purchase of the property on Court street, and she was entitled to be reimbursed that amount, but without interest, out of the proceeds of sale of the property, and a lien on the property was declared in her favor for that amount; that \$100 of the money used in the purchase of the certificates of stock belonged to the infant defendants, and they were entitled to be reimbursed that amount, with interest, out of the proceeds of sale of the stock; that the conveyances of property were void as against the complainant, except as to the amounts so allowed, and the property was subject to condemnation and sale for the satisfaction of Vincent's indebtedness to the State, to be ascertained by the register upon a statement of his accounts as ordered. Under

[Vincent v. The State.]

this reference, the register stated the accounts of Vincent as treasurer, and reported that the balance due from him to the State, on the 31st January, 1883, was \$242,440.19; and the court confirmed his report, overruling the several exceptions filed by the defendants.

The appeal is sued out by Mrs. Vincent and her children, and they here assign as error, 1st, the failure of the court to sustain the defendants' objections to the auditor's statement as evidence; 2d, the decree of reference to the register; 3d, the overruling of the defendants' exceptions to the register's report; and, 4th, the final decree.

W. L. BRAGG, for the appellants.—(1.) The statement of Vincent's accounts as treasurer, by Carnichael as auditor, is incomplete on its face, and shows that he is entitled to other credits, besides those allowed him; and even if it were complete, it would not be competent evidence against the defendants in this case. (2.) The burden of proof was on the complainant, seeking to set aside voluntary conveyances by Vincent, to show an indebtedness on his part prior to the execution of those conveyances; or, if a subsequent indebtedness was shown, to prove a fraudulent intent on his part, and participation in that intent by the grantees. There is no attempt to trace any of the complainant's money into this property.—Story on Agency, 229, 7th ed. There is no legal proof of any prior indebtedness, nor of any fraudulent intent on Vincent's part in the matter of these conveyances; and the evidence entirely exonerates Mrs. Vincent from any complicity in his wrongful acts, or any knowledge thereof. Gifts by a husband to his wife are good against creditors, unless tainted by a fraudulent intent. *Graves v. Blake*, 57 Ala. 379. If Vincent had converted his wife's separate estate, he had the right to secure her, though he were largely indebted, or even insolvent.—*Northington v. Faber*, 52 Ala. 45; 55 Ala. 369; 67 Ala. 599; 57 Ala. 246; 66 Ala. 55. (3.) But there was no conversion of his wife's funds by Vincent: on the contrary, it is proved that he used and invested it for her benefit, as he might lawfully do; and she was entitled, as against his creditors, to the profits arising from the investment.—*Early & Lane v. Owens*, 68 Ala. 180; *Fellows v. Lewis*, 65 Ala. 343; *Wilson v. Sheppard*, 28 Ala. 623; *Goodlett v. Hansell*, 66 Ala. 151. (4.) The bill seeks to enforce a civil liability, against which a claim of exemption is allowed, although the same act may be a tort, or even a crime. Exemptions are allowed, principally, for the benefit of the debtor's family, and stand on principles of public policy; and the statutes should be liberally construed, in order to effectuate that policy. "Debts contracted," as used in the statute, mean debts

[Vincent v. The State.]

incurred; and the complainant's claim is a debt, although it may spring out of a tort. That an exemption may be claimed against the State, see Thompson on Exemptions, § 386. (5.) There is no evidence that the certificates of stock were purchased with the complainant's money, nor is there any evidence which negatives the *bona fides* of the purchase.

H. C. TOMPKINS, Attorney-General, *contra*.—(1.) The statement of Vincent's accounts by the auditor was admissible as evidence on common-law principles, and is expressly made so by statute; and even if it were inadmissible, the defalcation was abundantly proved by other evidence.—Code, §§ 85, 103, 107, 3047–9; 1 Whart. Ev. §§ 108, 640, and authorities cited; 1 Greenl. Ev. §§ 383–4, 491; *Buckley v. United States*, 4 Howard, 251; 2 Brick. Dig. 23, § 123. (2.) Vincent being indebted to the complainant prior to the execution of the conveyances sought to be set aside, the burden of proving a valuable consideration was cast on the grantees; and this could not be proved by the subsequent declarations of the grantor.—*Hubbard v. Allen*, 59 Ala. 296; *Br. Bank v. Kenney*, 5 Ala. 9; *McCuin v. Wood*, 4 Ala. 258; *McCuskle v. Amerine*, 12 Ala. 17. (3.) Mrs. Vincent was allowed a lien on the property, for the full amount of her money received and used by her husband; and this is all she was entitled to.—*Hubbard v. Allen*, 59 Ala. 296; *Early & Lane v. Owens*, 68 Ala. 171. (4.) The complainant's claim does not grow out of a contract, but from an embezzlement and conversion of public moneys by an officer, which is both a tort and a crime, and against which no exemption can be allowed.—*Meredith v. Holmes*, 68 Ala. 190; *Williams v. Bowden*, 69 Ala. 433; *Lathrop v. Singer*, 39 Barb. 396; *Massie v. Enyart*, 33 Ark. 688; *Smith v. Raysdale*, 36 Ark. 297; 25 La. Ann. 187. No exemptions can be allowed against the State in any case, unless it is expressly named in the statute.—*Com. v. Ford*, 29 Grat. 683; *Whiteacre v. Rector*, 1b. 766; *United States v. Hewes*, Crabbe, 307; *State v. Kinne*, 41 N. H. 238; *United States v. Hoar*, 2 Mason, 311; *People v. Rossiter*, 4 Cow. 143; *Com. v. Baldwin*, 1 Watts, 54; *Lott v. Brewer*, 64 Ala. 287; *Brooks v. State*, 54 Geo. 36; *Com. v. Cook*, 8 Barb. 220.

STONE, J.—One indebted, or on whom there rests a legal liability, can not make a gift, or voluntary conveyance of property, which will be upheld against such pre-existing debt or liability. And when a prior debt or legal liability is shown, to which such conveyed property is sought to be made subject, the burden is on the grantee, to show that the conveyance is supported by a sufficient, valuable consideration.—*Miller v.*

[Vincent v. The State.]

Thompson, 3 Por. 196; *Costillo v. Thompson*, 9 Ala. 937; *Spencer v. Godwin*, 3 Ala. 355; *Huggins v. Perrine*, *Ib.* 396; *Hamilton v. Blackwell*, 60 Ala. 545; *Zelnicker v. Bingham*, at the present term; 2 Brick. Dig. 21, § 100.

The language of our woman's law, enacted in 1850, is, that all property held by the wife previous to her marriage, or to which she may become entitled during the coverture, is her separate estate, not subject to the debts of her husband, but, nevertheless, vests in him as her trustee, who has the right to manage and control the same, and is not liable to account with the wife, her heirs or legal representatives, for the rents, income, or profits thereof.—Code of 1876, §§ 2705–6; *Lee v. Tannenbaum*, 62 Ala. 501; *Early v. Owens*, 68 Ala. 171.

If the husband convert the *corpus* of his wife's separate estate, either by using it for his own purposes, or by otherwise investing it in property in his own name, he may convey to her, in payment, either the property purchased, or other property of his own; and if there be no material disparity between the liability, and the value of the property conveyed, chancery will uphold the conveyance, and protect her rights.—*Wilson v. Sheppard*, 28 Ala. 623; *Warren v. Jones*, 68 Ala. 449; *Coleman v. Smith*, 56 Ala. 399.

This principle, however, does not embrace, or extend to the income and profits of the wife's statutory separate estate. The husband is not liable to account for these, either to the wife, or to her heirs or legal representatives.—*Whitman v. Abernathy*, 33 Ala. 155; *Lee v. Tannenbaum*, *supra*. His duty to expend them in the support of the household, is an imperfect obligation, and will not support a conveyance afterwards made to the wife, against the claims of prior creditors of the husband.—*Early v. Owens*, 68 Ala. 171; *Whitman v. Abernathy*, 33 Ala. 154.

We will not affirm that this statutory marital right of the husband, to control and dispose of the income and profits of the wife's property, may not be renounced in favor of the wife, or invested primarily for her benefit; but such election, to be available, must have been made before the income accrued, or before it was administered or invested. It is too late, after liabilities have been incurred, and after there has been conversion by the husband, or investment in his name.—*Early v. Owens*, *supra*; *Cahalan v. Monroe*, 70 Ala. 271.

Declarations made by parties, contemporaneously with a contract, and shedding light thereon; and declarations made by one in possession of property, explanatory of the possession, or in disparagement of the title of the declarant, are admissible in evidence, as constituting part of the *res gestæ*. But such declarations are not evidence of the source from which title was

[Vincent v. The State.]

derived, or as mere narrations of past transactions.—1 Brick. Dig. 843, §§ 553, 554, 557, 558, 560; *Ala. Gr. So. R. R. Co. v. Hawks*, 72 Ala. 112; *Walker v. Elledge*, 65 Ala. 51.

In transactions between persons nearly related, such as husband and wife, parent and child, &c., the law regards suspicious circumstances with severer scrutiny, and requires fuller explanation, than when the transaction is between mere strangers. *Hamilton v. Blackwell*, 60 Ala. 545; *Harrell v. Mitchell*, 61 Ala. 270; *Hubbard v. Allen*, 59 Ala. 283; *Pyron v. Lemon*, 67 Ala. 458.

We do not consider it necessary to decide the question of the admissibility of the auditor's certified account against Vincent, the treasurer. There was present before the chancellor on the hearing, the depositions of Goldthwaite, Gilmer and Crawford. The first two, Goldthwaite and Gilmer, proved that Vincent converted to his own use twenty thousand dollars of the State's funds, on the 10th of March, 1881. Crawford proved a deficit of some two hundred thousand dollars in October, 1882. The twenty thousand dollars converted March 10th, fixed a liability on Vincent at that time, which was never paid, so far as we are informed. The property in controversy was purchased at much less than twenty thousand dollars, and was all acquired after that time. The lot on the corner of Washington and Lawrence streets was first purchased, for fifteen hundred dollars, and title taken in the name of Mrs. Vincent. This purchase bore date June 20th, 1881. It is shown that Mrs. Vincent approved this purchase, and it would seem that this was an investment of her moneys *pro tanto*, if it had been so insisted on. The point is not urged, however, and we will not consider it. Its consideration would not, probably, change the result materially.

The next purchase, claimed by Mrs. Vincent to have been made for her benefit, was the residence lot fronting on Court street. This purchase was made July 11th, 1881, at the price of seven thousand dollars, and title made to Vincent. Soon afterwards Vincent and his family commenced to occupy this property as a residence, and continued to so occupy it, until Vincent fled the country, January 29th, 1883. On the 10th January, 1883, Vincent conveyed this property to his wife, by a deed reciting it had been purchased for her, and with her money. The chancellor decreed that two thousand two hundred and twenty-six 15-100 dollars of Mrs. Vincent's money—the entire principal of her patrimony—went into the purchase of this Court street property, and he decreed her a lien on its proceeds for that sum. He denied her interest on this sum. He also condemned the lot on the corner of Washington and Lawrence streets to the payment of Vincent's default. It is not denied that the chancellor correctly ascertained the amount

[Vincent v. The State.]

of the *corpus* of Mrs. Vincent's statutory estate, which was received by her husband. They were married in 1874, and Vincent soon afterwards collected her distributive share of her father's estate—the sum ascertained by the chancellor.

It is claimed by Mrs. Vincent that she was and is entitled to the profits she alleges were made on her money while in the hands of her husband, which she claims had swelled the sum up to forty-five hundred dollars. This is the only really controverted question in the suit.

Weighing the testimony by the standard declared above, we feel forced to hold it is wholly insufficient to prove that Vincent renounced his marital right to control his wife's moneys, or to administer them for her individual use. According to Mrs. Vincent's testimony, her husband received her moneys at different times. Speaking of one occasion—the language indicates but one time—she says: "He went, and on his return offered me money, saying it was mine; but I told him to keep and invest it in something profitable." Now, this testimony makes no intimation whatever of any particular sum then received. It may have been one dollar, or it may have been a thousand. But, there is another objection to it still more decisive, even if the language referred to her entire patrimony. There was not a word said by either, indicating Vincent's abnegation of marital control, or that the investment was to be for the wife's individual profit. All the other testimony given in support of Mrs. Vincent's claim of the profits realized, and, indeed, that any profits were realized, consisted of the recitals of the deed of January 10th, 1883, and of his verbal admissions, which were, at most, mere narrations of facts alleged to have previously existed. The chancellor did not err in denying to Mrs. Vincent all interest or profit on her money.

The only testimony tending to show when the insurance company stock was purchased, is that of Shapard and McNamee. They sold stock to Vincent July 7th, 1881. This, too, was after his default as treasurer. No objection has been urged against this feature of the decree, and we think the chancellor determined it correctly.

We have made no allusion in this opinion to the liability incurred by Vincent, by virtue of the official bonds executed by him. His fault and deficit consisted of a conversion and misappropriation of the State's money in his hands as treasurer. This was a tort and a crime. Against such liability, the law has declared no exemptions of property.—*Meredith v. Holmes*, 68 Ala. 190; *Williams v. Bowden*, 69 Ala. 433.

We find no error in the record, and the decree of the chancellor is affirmed.

Parmer v. Parmer.

Bill in Equity by Mortgagor, for Redemption.

1. *Waiver of equity of redemption, or of statutory right of redemption.* The mortgagor's equity of redemption can not be waived or extinguished by any agreement entered into contemporaneously with the execution of the mortgage, though a subsequent assignment, if made *bona fide*, will be upheld; and the reason and policy of this principle are equally applicable to a waiver or release of the statutory right of redemption.

2. *Rents and profits, and permanent improvements.*—Rents and profits which accrued before a tender and refusal, may be set off against the permanent improvements shown to have been made, though any excess thereof above the value of such improvements can not be recovered against the mortgagee, when in possession under a sale foreclosing the mortgage; but the mortgagor is entitled, on redemption, to all the rents and profits accruing after his tender and offer to redeem, and to interest on each year's annual rent.

3. *What are "lawful charges" on redemption.*—Cross demands in favor of the mortgagee, not embraced in or covered by the mortgage, are not a part of the "lawful charges" (Code, § 2879) which the mortgagor, seeking to redeem after a sale, is required to pay or tender; nor can he be charged with the value of permanent improvements erected after the tender and refusal.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JNO. A. FOSTER.

The bill in this case was filed on the 20th January, 1881, by Felix O. Parmer, against William K. Parmer, and the heirs at law of Joseph M. Parmer; and sought to redeem certain lands, which had been sold under a power contained in a mortgage executed by the complainant to said William K. Parmer, and which said W. K. Parmer held and claimed under a conveyance from the purchaser at that sale. The lands had belonged to the estate of said Joseph M. Parmer, deceased, and were sold by said Wm. K. Parmer, as administrator, on the 9th September, 1872, under an order of the Probate Court. The complainant became the purchaser at the sale, at the price of \$323.75, and made the cash payment of one-half; and the sale was reported to the court by the administrator. When the balance of the purchase-money became due, in February, 1873, by agreement between the complainant and said administrator, the latter reported the purchase-money as paid in full, obtained an order to make a deed to the purchaser, and executed a conveyance to the complainant as the purchaser; and the complainant and his wife afterwards executed and delivered to said W. K.

[Parmer v. Parmer.]

Parmer a mortgage on the land to secure the payment of the balance due, recited to be \$171.63. This mortgage was dated and executed in April, 1873, contained a power of sale if default should be made in the payment of the debt on or before the 1st October, 1873, and the following covenants and stipulations were added: "And we covenant with said W. K. Parmer, that we are lawfully seized of said land in fee, that the same is unincumbered, that we have a good right to sell and convey the same, and that we will warrant and defend the title of the purchaser at such sale, against ourselves, our heirs and assigns, and against all other persons claiming the same, or any part thereof; and we hereby waive all right of redemption to said land." The complainant continued in the possession of the land, and there were various transactions between him and said Wm. K. Parmer, until December, 1879, when the latter sold the land under the power contained in the mortgage; John Bolling becoming the purchaser, at the price of \$260, and receiving a conveyance from said Wm. K. Parmer. The bill alleged, that the complainant delivered the possession of the land to Bolling, on demand, within ten days after the sale; "that soon thereafter, or before, complainant is not informed when, said Bolling re-conveyed said land to said Wm. K. Parmer, who has been in possession, in person or by tenants, ever since; that on the 31st May, 1880, complainant tendered to said Wm. K. Parmer, in legal-tender notes of the United States, the said sum of \$260, with interest and ten per-cent. *per annum*, and then and there offered to pay him, in such legal-tender notes, the amount of all improvements which he or said Bolling had put on said land since said mortgage sale, and also all other lawful charges; but said Wm. K. Parmer refused to state the value of said improvements, and refused to receive any money from complainant, and refused to allow him to redeem said land, for the reason, as then stated by said Wm. K., that complainant had waived his right to redeem said land in said mortgage." The bill alleged, also, that the deed executed to the complainant by said Wm. K. Parmer, as administrator, was neither acknowledged, nor attested by any subscribing witnesses, and hence was ineffectual as a conveyance of the legal title; and it prayed that the title might be divested out of the heirs at law of said Joseph M. Parmer, who were made defendants to the bill for that purpose.

An answer was filed by Wm. K. Parmer, admitting the material allegations of the bill as above stated; denying that the complainant had any right of redemption, having expressly waived it in the mortgage; claiming credits, if the right to redeem should be allowed, for repairs and improvements made, and for taxes paid; denying his liability for rents, and claiming

[Parmer v. Parmer.]

as a set-off against such liability, if allowed, certain debts due to him by the complainant.

The cause being submitted for decree on pleadings and proof, the chancellor held the complainant entitled to relief as prayed, and ordered a reference to the register of the matters of account; and on the coming in of the register's report, which, after charging the defendant with rents from and after the tender and offer to redeem, and allowing him credit for taxes paid and improvements made prior to the tender, showed a balance of \$141 due from the complainant on the mortgage debt, he overruled the defendant's exceptions, confirmed the report, and rendered a final decree in favor of the complainant; directing the register, on the payment of the money into court, to cancel the mortgage, and enter satisfaction of it on the records, and to put the complainant into possession of the land.

The appeal is sued out by Wm. K. Parmer, and he here assigns as error the overruling of his several exceptions to the register's report, and each one of the chancellor's decrees.

JOHN GAMBLE, for the appellant.—The mortgage contains not only an express waiver of the right of redemption, but also covenants of warranty to the purchaser; and it is shown by the evidence that this was a material inducement to the contract.—1 Jones on Mortgages, § 676. The sale under the power in the mortgage was a strict foreclosure, leaving nothing in the mortgagor but the statutory right of redemption. *Childress v. Monette*, 54 Ala. 317; *McLean v. Presley's Adm'r*, 56 Ala. 217; *Harris v. Miller*, 71 Ala. 26; 17 Ill. 259; 87 Ill. 513. The bill is filed to enforce this statutory right of redemption, and alleges a tender of the amount paid by the purchaser at the sale; yet the chancellor decrees a redemption under the mortgage, on payment of the balance due on the mortgage debt. The defendant was in possession, not as mortgagee, but as purchaser, and was not chargeable with rents.—2 Jones on Mortgages, § 1118. The debts due from the complainant, as proved, were "lawful charges," which should have been taken into the account.—Code, §§ 2878-79; 5 Wait's Actions & Defenses, 433, § 9. As to the value of the improvements, the weight of the evidence is clearly against the conclusions of the register.

J. C. RICHARDSON, *contra*, cited *Bethell v. Vernon*, 2 Eden, 112; Story's Equity, § 1019; 2 Jones on Mortgages, § 1039; *McKinstry v. Conly*, 12 Ala. 682; *Robinson v. Farelly*, 16 Ala. 479.

SOMERVILLE, J.—No principle of equity jurisprudence

[Parmer v. Parmer.]

is more firmly settled, than that the mortgagor's right to redeem can not be waived or extinguished by any collateral agreement entered into contemporaneously with the execution of the mortgage. Courts uniformly regard with great jealousy all attempts to fetter or embarrass the exercise of this right, which is an outgrowth of the just triumph of equitable principles over the harsh operation of a mere technical rule of law. Where, therefore, a mortgagor is induced to enter into a contract with the mortgagee, *at the time of the loan of the money*, waiving, or agreeing not to exercise, his right of redemption in the event of default, the contract will be set aside, as being oppressive to the debtor, and offensive to the established maxim of equity, "once a mortgage, always a mortgage."—2 Fonb. Eq., B. 3, ch. 1, § 4; Willard's Eq. Jur. 428, 447; *Holdridge v. Gillespie*, 2 John. Ch. 30; 2 Jones Mortg. § 1039; *McKinstry v. Conly*, 12 Ala. 682; Story's Eq. Jur. § 1019; *Baxter v. Willey*, 31 Amer. Dec. 623. A *bona fide* purchase, however, of an equity of redemption, effected subsequently to the mortgage, though often scanned with watchfulness by the courts, will be upheld.—3 Add. Contr. § 1026; 15 Viner's Abr. 468..

The statutory right of redemption, conferred by our Code of laws upon mortgagors and judgment debtors, is, of course, essentially different in many respects from "an equity of redemption" proper. Unlike the latter, it is not an estate in the lands subject to levy and sale under execution, but a mere personal privilege conferred upon the debtor, to be exercised by him upon certain prescribed conditions.—Code, 1876, §§ 2877–79; *Childress v. Monette*, 54 Ala. 317. Yet the policy of each is essentially the same, and the courts are inclined to construe them both favorably for the protection of the debtor against any undue oppression on the part of the creditor.—*Carlin v. Jones*, 55 Ala. 624; *Briggs v. Seymour*, 17 Wis. 255. We are clearly of opinion, that the reason and policy of the law, which render voidable any stipulation disannexing the equity of redemption from a mortgage, apply with equal force to prohibit the waiving of the debtor's statutory right of redemption. The chancellor did not err in holding this to be the law in the present case.

2. The settled rule as to *rents* is as follows: The rents and profits which accrued *before* the tender and refusal, may be set off against the permanent improvements shown to have been made; but any excess of such rents, over and above the value of improvements, is not recoverable by the complainant against the mortgagee, who is in possession under a sale of the mortgaged premises.—*Weathers v. Spears*, 27 Ala. 455; *Spoor v. Phillips*, *Id.* 193. But the complainant is entitled to recover

[Parmer v. Parmer.]

all rents accruing *after* his tender and offer to redeem. The effect of the tender, even if refused by the mortgagee, if made in time, is to re-invest the mortgagor with the title to his property, of which he was divested by the mortgage sale. The statute so expressly declares.—Code of 1876, § 2879. “This clothes him with all the rights and incidents of ownership, and, among other things, with the right to be compensated for the use and occupation of his lands, wrongfully withheld. He is entitled to annual rent, with interest on each year’s renting, until the coming in of the report.”—*Carlin v. Jones*, 55 Ala. 624, 630.

We can not see from any thing in the record that the register, in taking the account between the appellant and appellee, departed from these principles, or that they were not recognized by the chancellor in his decretal order of reference.

3. There certainly was no error in the refusal of the register to allow the mortgagee to set off, as against the rents, the demands preferred by him against the mortgagor, having no sort of connection with the mortgaged property. These demands were ordinary debts, not covered by the mortgage. The complainant is authorized to redeem, by paying the amount of the mortgage debt, with ten per-cent. *per annum* thereon, up to the time of making tender, “with all other *lawful charges*.” Code, § 2879. This embraces only such claims or demands as are in the nature of an incumbrance or lien, for which the purchaser would be entitled to hold the land as security.—*Lehman v. Collins*, 69 Ala. 127; *Grigg v. Banks*, 59 Ala. 311, 317; *Couthway v. Berghaus*, 25 Ala. 393; *Walker v. Ball*, 39 Ala. 298. It is manifest that, if the sets-off claimed by the mortgagee before the register had been allowed, the legal effect would have been to indirectly create them *liens* upon the mortgaged property, in the face of the fact that there was no agreement between the parties to this effect.

We are not disposed to disturb the findings of the register, on the facts, as to the value of the improvements made upon the property by the mortgagee after the sale. No allowance can be made in such cases, except for improvements which are *permanent* in their nature.—Code, § 2887. So, nothing is to be allowed for improvements of any kind, which are made after the complainant offered to redeem by making a legal tender, such as is required by the terms of the statute. If the value of these improvements exceeds the amount found by the register in his report, it is shown that a large portion of them were made after the offer of redemption, and therefore in the wrong of the mortgagee and at his own hazard.

We discover no error in the decree of the chancellor, and it is, therefore, affirmed.

Chilton v. Ala. Gold Life Insurance Co.*Bill in Equity for Foreclosure of Mortgage.*

1. *Non-resident defendants; decree pro confesso against.*—A decree against a non-resident defendant, who does not appear, and who is brought in by publication only, can not be supported on error, unless the record affirmatively shows a compliance with the statutory provisions and rules of practice authorizing it: there must be a proper order of publication, made and executed as required by the statute and the rules of practice, and a decree *pro confesso* based thereon, which states the facts on which it is founded; and the mere recitals of the final decree, as to the rendition of a decree *pro confesso*, are not sufficient to show the rendition and regularity of such decree *pro confesso*.

2. *Same; affidavit of non-residence.*—The affidavit as to the non-residence of the defendant must state whether, in the belief of the affiant, he is over or under the age of twenty-one years, or that his age is unknown (Rule No. 25; Code, p. 165); and the failure to comply with this rule is fatal to the regularity of the subsequent proceedings.

3. *Sale by register.*—In making a sale under a decree, the register is bound to conform to its terms; he can not sell on credit, when ordered to sell for cash; but, while he can not bind himself to wait on the purchaser any specified time, a mere delay of two days in collecting the money bid is not sufficient to avoid the sale, when no injury resulted from the delay.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed on the 15th December, 1881, by the Alabama Gold Life Insurance Company, a domestic corporation, against Margaret L. Chilton and others; and sought to foreclose a mortgage on certain real estate in the city of Montgomery, known as the "Montgomery Female College" property. The mortgage, a copy of which was made an exhibit to the bill, was executed by Mrs. Lavinia T. Chilton, deceased; was dated the 6th July, 1872, and given to secure the payment of two promissory notes, together amounting to \$2,600, of even date with the mortgage, and payable one and two years after date. Mrs. Chilton, the mortgagor, died in October, 1881, leaving Margaret L. Chilton, the defendant, her only child and heir at law. Samuel F. Rice, Mrs. A. B. Clitherall, Jas. A. Farley, and Mrs. M. A. Powell, as the holders of claims secured by junior mortgages in the order named, were also made defendants to the bill.

The original bill alleged, "that no letters of administration have ever been granted on the estate of the said Lavinia T.

[Chilton v. Ala. Gold Life Insurance Co.]

Chilton, deceased, who died, in October last, intestate; and that said Margaret L. Chilton, her only child, is over the age of twenty-one years, is unmarried, and now resides, as orator is informed, believes, and so represents, in the town of Mansfield, in the State of Louisiana." The bill was not sworn to. An affidavit was filed in the cause, two days after the filing of the bill, which was made by the complainant's solicitor before a notary public, and in which he swore that, "from the best of his information and belief, the above named defendant, Margaret Chilton, resides in the town of Mansfield, in the State of Louisiana, and that an order of publication will be necessary to bring said defendant into court;" and on the filing of this affidavit, an order of publication, in due form, was made and entered against said defendant, requiring her to appear and answer by the 20th January next thereafter. A decree *pro confesso* seems to have been entered against all of the defendants on the 23d February, 1882, but it is nowhere copied into the transcript. Among the "Orders of Court," as copied, which appear to be the entries on the docket, is an entry, or memorandum, in these words: "Feb. 23d, 1882. Decree *pro confesso* against Samuel F. Rice, Jas. A. Farley, A. B. Clitherall, and M. A. Powell, on personal service; and against Margaret Chilton, on publication." In decrees subsequently entered in the cause it is recited that a decree *pro confesso* had been taken against Margaret Chilton; and in the note of submission, as entered by the register, the "decree *pro confesso* against Margaret Chilton" is mentioned as a part of the evidence submitted by the other defendants.

The decrees *pro confesso* against Rice, Farley, Mrs. Clitherall, and Mrs. Powell, were set aside, on motion, on a subsequent day of the February term, 1882; and answers were filed by each of them, setting up their respective claims. Before these decrees were set aside, an order of reference had been made, directing the register to state an account of the several mortgage debts; and the register's report was confirmed, without objection, after these answers were filed, and a decree of sale rendered; but this decree was afterwards set aside, on motion of the complainant, and leave granted to file an amended bill. The amended bill alleged that Mrs. Chilton's estate was insolvent, and that F. A. Hall had been appointed and qualified as her administrator; and brought in said administrator as a party defendant. An answer was then filed by said Hall as administrator, and a decree *pro confesso* on the amended bill was entered against Margaret Chilton; in which decree it is again recited, that a decree *pro confesso* on the original bill had been entered against her on the 23d February, 1882. Another reference of the matters of account was ordered, and the register's

[Chilton v. Ala. Gold Life Insurance Co.]

report having been confirmed without objection, the cause was again submitted for decree on the pleadings and proof, and a decree of sale was made.

At the sale, which was ordered to be made for cash, as the register reported, the city of Montgomery became the purchaser, at the price of \$6,000; and he further reported that the money was paid to him, on his demand, two days after the sale, including interest for the two days. On the morning of the day on which the money was so paid, written objections were filed by Mrs. Powell, in the office of the register, but in his absence, to his acceptance of the money, on the ground that the terms of sale had not been complied with; and the register reported these facts to the court. On this ground, Mrs. Powell objected to the confirmation of the sale, and asked a re-sale of the property; but the court overruled her objection, and confirmed the sale.

The appeal is sued out, in the name of all the defendants, by Margaret Chilton and M. A. Powell, and each of them assigns errors. The errors assigned by the former are, the final decree, the decrees ordering a reference and sale, the decree *pro confesso* on the amended bill, and the decree *pro confesso* on the original bill; and by the latter, the confirmation of the sale, and the overruling of the motion to set it aside.

W. S. THORINGTON, for appellants.—(1.) To authorize a final decree against a non-resident, on publication only, the record must show a strict compliance with the statutes and rules of practice.—*Cook v. Rogers*, 64 Ala. 406; *Paulling v. Creagh*, 63 Ala. 400; *Holly v. Bass*, 63 Ala. 391. The affidavit of non-residence was fatally defective, because it did not state the age of the non-resident (Rule No. 25; Code, 165); and its deficiencies can not be aided by the bill, which is not under oath; and even if the affidavit was sufficient, the failure of the record to show a regular decree *pro confesso* is a fatal defect. (2.) The sale ought to have been set aside, on the authority of *Williamson v. Berry*, 8 How U. S. 544; *Sauer v. Steinbauer*, 14 Wisc. 70.

E. P. MORRISSETT, *contra*.—Publication is intended as a substitute for personal service.—2 Ala. 420. Affidavit seems necessary, only as to infants.—*Erwin v. Ferguson*, 5 Ala. 167; *McGowan v. Br. Bank*, 7 Ala. 826; 12 Ala. 267. The statute (Code, § 3769) is mandatory, and was strictly followed; while the rule of practice is directory merely, and can not add to the requirements of the statute.

BRICKELL, C. J.—The making defendants to a suit in
VOL. LXXIV.

[Chilton v. Ala. Gold Life Insurance Co.]

equity of parties residing without the State, upon whom process is not served, and who have only constructive notice by publication in a newspaper, is statutory : it is not according to the ordinary practice of the court, and not within its ordinary jurisdiction. A final decree rendered against a defendant not appearing, made a party only by publication under the statute and the rules which have been adopted to carry the statute into effect, can not be supported, when directly assailed on error, unless the record affirmatively shows a decree *pro confesso*, preceded by an appropriate order of publication, made and executed in conformity to the statute and rules of practice. The record must not only show the decree *pro confesso*, but it must also show the facts which render the decree regular, and authorize its rendition. Recitals in the final decree, that the decree *pro confesso* had been taken, or separately of facts which would authorize its rendition, can not supply its absence.—*Hartley v. Bloodgood*, 16 Ala. 233; *Hanson v. Patterson*, 17 Ala. 738. When a court of general jurisdiction is, in the exercise of its ordinary, accustomed powers, pursuing its ordinary remedies against parties voluntarily appearing, or who have been brought in by the service of personal process, all reasonable intendments and presumptions are, on error, indulged in support of the regularity of its proceedings and judgments. But, when it is in the exercise of special authority, derived wholly from statutes in derogation of the common law, on error, a reversal of its decree or judgment must follow, unless the record affirmatively discloses a strict conformity to the statute.—*Gunn v. Howell*, 27 Ala. 663.

There is, in the present record, an affidavit of the solicitor of the complainant, disclosing that the heir of the deceased mortgagor, an indispensable party defendant, resided without the State, at a place designated, in the State of Louisiana; and the affidavit is, in this particular, an affirmation of the truth of a distinct averment of the original bill. But, whether she was above or under the age of twenty-one years within the belief of the affiant, or whether to him her age was unknown, is not stated. The rule of practice (Rule 25; Code of 1876, p. 165) expressly requires, that the affidavit, upon which an order of publication as to a non-resident defendant is founded, must state "the belief of the affiant as to the age of the defendant, being over or under twenty-one years," or that the age is unknown. The reason of the requirement is plain: the proceedings which are to follow the execution of the order of publication are dependent upon the age of the defendant. If he be an adult, a decree *pro confesso* follows,—an admission of the truth of all facts well pleaded in the bill, justifying the rendition of a final decree against him without other evidence; but,

[Chilton v. Ala. Gold Life Insurance Co.]

if he be not an adult—if an infant—a guardian *ad litem* for him must be appointed, whose duty it is to require evidence in support of the allegations of the bill. It is not difficult to observe the requirements of the statute and of the rules of practice in proceedings of this character, when the facts exist which authorize them. But, if it were, the courts are powerless to dispense with them, or to accept substitutes for them. If parties will not observe them, they imperil the validity of decrees or judgments founded upon them. There is not only this defect in the affidavit which is the foundation of the subsequent proceedings, but there is not in the record a decree *pro confesso* upon the original bill against the non-resident defendant. In its absence, a final decree against her could not be pronounced. There is a recital of the existence of such a decree found in different parts of the record; but the decree itself, showing upon its face all facts essential to its validity, if it ever had an existence, is not a part of the record. Its absence can not be supplied by recitals of its existence, nor by intendment or presumption which might be drawn from them, if the court was in the exercise of its ordinary, and not of statutory authority.

The register, in making a sale under the decree, was bound to conform to its terms. From it he derives his authority; and unless it was with the consent and approbation of all parties in interest, the terms of sale prescribed by the decree could not be varied. A sale for cash being decreed, he could not sell on credit; nor could the register, by agreement with the purchaser, delay the payment of the purchase-money for any specific period of time, though it may be very brief: he could not disable himself from demanding the consummation of the sale by the payment of the purchase-money, immediately upon the declaration that the offer or bid of the purchaser was accepted as the highest and best. But it is obvious that the two can not be instantaneous; that there will be an interval which must be consumed in the counting and payment of the purchase-money; and it must frequently occur that the purchaser, while having the money within reach, may not have it present at the place of sale. There can be no objection to an accommodation of the conduct of the officer making the sale, to necessities, or exigencies of this kind, which may arise. The sale would be a sale for cash, when the officer has the right of demanding immediate payment. In the present case, the sale was for cash, in precise conformity to the decree; and the delay of payment of the purchase-money for two days resulted from the failure of the register to demand it earlier; and the demand was not pressed immediately upon the acceptance of the bid, most probably, because for some length of time the money, if received, would lie idly in the registry of the court. There is

[Williams v. McCarty.]

no complaint that the sale was not fairly and regularly conducted, nor that the sum bid was not equal to the value of the premises. It would weaken confidence in judicial sales, and unnecessarily embarrass them, if, under these circumstances, the sale had been set aside, because of the unintentional, accidental delay for two days in the payment of the purchase-money, working injury to no one.

The other questions presented by the assignment of errors will not probably arise again under the same state of pleadings, and it is not necessary to consider them. For the errors pointed out, the decree must be reversed, and the cause remanded.

Williams v. McCarty.

Bill in Equity to enforce Vendor's Lien on Land.

1. *Vendor's lien; discharged by novation of contract.*—Where lands were sold by an executor, under authority conferred by a private statute, for the purpose of division and distribution among the parties interested under the will, five of whom became the purchasers, and gave their joint note for the deferred payment; and the sale was reported to the Chancery Court, as required by the statute, and was confirmed; and afterwards, in order to enable the executor to settle with the other devisees and distributees, the purchasers gave him receipts for their distributive shares of the estate, at an agreed valuation, in part payment of the note, and a new joint note for \$2,500, balance of purchase-money in excess of agreed valuation; and he thereupon reported the purchase-money paid in full, executed a conveyance to the purchasers under the order of the court, and charged himself with the purchase-money on final settlement of his accounts; and four of the purchasers paid their proportion of the \$2,500, but the fifth failed to pay any part of her proportion, the arrangement made by her husband for its payment having failed by reason of his misrepresentations to the executor; *held*, that the compromise, or settlement of the original note, was a novation of the contract, and discharged the land which, on subsequent division by agreement among the purchasers, was allotted to the defaulting distributee, from a vendor's lien for the unpaid balance.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 14th February, 1882, by Robert S. Williams, against Mrs. Sallie McCarty and her husband, M. F. McCarty, or Fletcher McCarty; and sought to enforce a vendor's lien on a tract of land, for an alleged balance of purchase-money remaining unpaid. A demurrer was interposed to the original bill, which was overruled by the chancellor; but his decree was reversed by this court on appeal,

[Williams v. McCarty.]

and the cause was remanded, in order that the complainant might have an opportunity to amend his bill, if he desired to do so.— *Williams v. McCarty*, 69 Ala. 174. The bill was accordingly amended by striking out some allegations in the 4th, 5th, 6th, and 7th paragraphs, and inserting and adding others. The 1st paragraph alleged, that the complainant, as the executor of the last will and testament of James H. Judkins, deceased, on the 22d January, 1872, sold the lands belonging to said estate, under an act of the General Assembly approved December 19th, 1871, “for the purpose of making a distribution and division among the devisees of the said deceased.” The 2d paragraph alleged, that Mrs. Sallie McCarty was one of the devisees under the will of the deceased, and entitled to one-twentieth part of the whole estate; “that at said sale, the said Sallie McCarty, acting through her said husband, Fletcher McCarty, united with her sisters, Virginia D. Judkins, Elizabeth Murray (wife of Alfred Murray), and Mary Dixon (wife of George W. Dixon), and with her brother, W. T. Judkins, and jointly purchased a large plantation, part of said lands, known as the ‘Judkins Ferry plantation,’ containing 2,126 acres, at the aggregate sum of \$16,651.50; that the terms of said sale were, one third of the purchase-money to be paid in cash, and the balance in one and two years, with interest from date of sale;” that the sale was duly reported to the Chancery Court at Montgomery, in which the estate of said Judkins was then in process of administration, and was confirmed by the court. The 3d paragraph alleged, “that the said purchasers did not pay any cash on their said purchase, but gave complainant their several receipts for so much of their distributive interests in said estate as was equal in the aggregate to the cash payment they were required to make by the terms of sale, and for the credit portion of their said purchase they executed to complainant, as such executor, their two joint promissory notes, signed by said W. T. Judkins, Virginia D. Judkins, Sallie McCarty, M. F. McCarty, Elizabeth A. Murray, and Mary N. Dixon,” each for \$5,634.15, dated January 23d, 1872, and payable January 22d, 1873, and 1874, respectively. The other paragraphs of the bill, as amended, were in these words:

“4. That said credit portion of said purchase-money, evidenced by said promissory notes, remained unpaid until April, 1876, when certain other of the devisees of said estate, who had not purchased any land at said sale, and who were entitled to have their distributive shares of said estate paid in cash, being about to institute proceedings to have said lands sold for the payment of the balance of the unpaid purchase-money, or to compel your orator to do so, by requiring him to account to them for the whole of said purchase-money as cash; and when

[Williams v. McCarty.]

it was evident that said lands would not, by many thousands of dollars, by reason of a decline in the value and price of lands, pay the balance due on them; your orator agreed with said purchasers that, if they would transfer to him, in full, their several distributive shares in said estate, he would give them credit for all the balance due on said purchase-money notes, except the sum of \$2,500, and that, on the payment of this sum, they were to have a title to said land, and your orator was to settle the claims of the devisees who had not purchased property of said estate, and who did not owe the estate any thing, out of his own means, or in such way as to protect the said purchasers from disturbance by them.

"5. That the liability resting on the said several purchasers, by reason of their said purchase and execution of said notes, was equal on each; that the payments made by each of them were exactly equal, and the balance of \$2,500 still remaining unpaid on said notes was, in equity, a liability on each one of said parties primarily to pay \$500 of said amount, although they were all jointly and severally bound to pay the whole of said \$2,500; and your orator therefore looked to each of said parties, as principal, for the payment to him of \$500 of said debt; which was done by all of them, except the said Sallie McCarty and her husband. And your orator avers that, if said debt for said land had been collected by legal proceedings, or said land re-sold for the payment thereof, and the same course pursued as to the other purchasers of lands at said sale, and an actual distribution of the assets of said estate made, the said Sallie McCarty and her brother and sisters jointly with her in the said purchase would have lost their lands, and would have received very little or nothing, for their distributive shares in said estate; because, by reason of the decline in the value of land after said sale, the assets of said estate, consisting mostly of lands, would have been very small, and their debts to said estate would have been so large as almost to absorb their respective distributive interests; and so your orator says it was greatly to the interest, and still is greatly to the interest of the said Sallie McCarty, and of the other devisees who were joint purchasers with her, to carry out the terms of said compromise and agreement.

"6. That said M. F. McCarty was the guardian of Robert Judkins, a child of W. T. Judkins, who was an infant distributee of the estate of said James H. Judkins; and said McCarty represented to your orator that he (said McCarty), as guardian of said Robert Judkins, had paid out large sums of money for said minor, for which he had vouchers largely in excess of the sum of \$500, and which were a good claim against the interest of said Robert Judkins in said estate, and would answer the

[Williams v. McCarty.]

same purpose as money to your orator in making his final settlement of said estate, and that he, as such guardian, would allow to your orator, as such executor, a credit for said sum of \$500; and your orator, believing said representations to be true, reported to said Chancery Court that all of said purchase-money had been paid; which it would have been in fact, if the statements of said McCarty had been true. Said report was made on the 24th July, 1876; and said Chancery Court thereupon made an order, directing that deeds to the lands purchased by them at said sale should be made to the purchasers thereof, or to such other person as they might direct; and thereupon your orator did execute a deed to said tract of land so purchased at said sale, to the said Sallie McCarty and the other purchasers thereof; and your orator avers that, in his accounts as executor with said estate, he has charged himself with the whole of the purchase-money agreed to be paid for said lands by the said purchasers, and has fully accounted for the same to the said estate; but that in fact the said Sallie McCarty owes to him the balance of \$500 of the said purchase-money above her distributive interest in said estate, with interest thereon from April 4th, 1876, by reason of the fact that said M. F. McCarty did not have the said vouchers or claims against said Robert Jenkins which he had represented to your orator that he had, and was not able to allow to your orator the credit which he had stated he would do, and in fact did not allow your orator any credit whatever on account of said \$500; and no part of said \$500 has ever been paid to your orator by any person, and your orator still holds the said original purchase-money notes, and has never made any change in said debt, or in the liability of any of the parties to said original notes.

"7. Said purchasers have made a division and partition of said lands among themselves, and said Sallie McCarty now owns, of said lands, in severalty, by and through said partition and division, the following portion of said plantation." describing it, "being a part of the said tract so purchased by her and her brother and sisters; and your orator is informed and believes that, if he proceeded to enforce his said lien against the whole of said lands, all the other parties would require him to first proceed against Mrs. McCarty's share of said lands for the payment of said balance, and, if that should be sufficient for the payment of the same, that he should not disturb their land, or claim any thing from them, and that he might be taxed with the costs of the parties unnecessarily brought into said litigation; and for this reason, as Mrs. McCarty's land is amply sufficient to satisfy his demand, your orator does not make any other of said purchasers parties to this bill."

The chancellor sustained a demurrer to the bill as amended,
VOL. LXXIV.

[Williams v. McCarty.]

and dismissed it for want of equity; and his decree is now assigned as error.

GUNTER & BLAKEY, for appellant.—That a vendor's lien on the land, for the payment of the original notes, was retained, can not be doubted; and that lien must still exist, unless it has been discharged, or released, by the subsequent dealings between the parties. The executor has reported the purchase-money as paid in full, and has accounted for it to the distributees of the estate; and he has thus acquired the right to enforce the vendor's lien in his own name.—*Rather v. Young*, 56 Ala. 94; *Waldrop v. Pearson*, 42 Ala. 636; *Hall v. Chenault*, 13 Ala. 710. His report of the payment of the purchase-money, and the action of the court in ordering a conveyance to the purchasers, even if the court had jurisdiction to make such order, do not estop him, as against the purchasers, from denying the fact of payment, and enforcing his lien for the unpaid balance. *Wallace v. Nichols*, 56 Ala. 321; *Stabler v. Spencer*, 64 Ala. The lien on the land has not been released, nor discharged; the unpaid balance is a portion of the purchase-money; there has been no change in the liability of any of the parties, and no new security has been taken. The substitution of a new note for the unpaid balance of \$2,500, executed by the same parties, did not work any change in their liabilities or relations. For the new note, as for the original notes, each purchaser was jointly bound; and the liability of each was the same—that is, he was bound as principal for his own part of the joint debt, and as surety for the others for their respective parts. The complainant might have filed his bill against all of them jointly, to subject the entire tract of land to the payment of the balance due; but, if he had done so, the defendants who had paid their full part of the debt, and were only liable as sureties for the defaulter, might have filed a cross-bill, and compelled him to first sell the land allotted in severalty to the defaulter.—*McGehee v. Owen*, 61 Ala. 144; *Martin v. Baldwin*, 7 Ala. 923; *Corbitt v. Clenny*, 52 Ala. 483. If the parties have voluntarily done what a court of equity would have compelled them to do—resolved their original joint contract into its natural equities, severing their respective interests and liabilities—a court of equity will sanction and give effect to the transaction.

ARRINGTON & GRAHAM, *contra*, cited *McCarty v. Williams*, 69 Ala. 174; and *Sims v. Sampey*, 64 Ala. 230.

STONE, J.—When land is sold and conveyed, leaving the purchase-money, or a part of it unpaid, there is a lien on the land in favor of the vendor, as security for the unpaid pur-

[Williams v. McCarty.]

chase-money. This is the general rule, and it rests on the principle, "that a person who has gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money." This lien is said to be the mere creature of equity. Certainly, equity first gave it vitality, and that court alone can administer and enforce it. It springs, as matter of law, out of the contract itself, and is not dependent on any expressed term of the contract. In *Bankhead v. Owen*, 60 Ala. 457, we considered its nature, and our prior rulings upon it, and we have no wish to enlarge upon what is there said, upon the questions there discussed.

The rule has exceptions. If an independent security be taken, our rulings are that, unexplained, this amounts to proof that no lien on the land was retained.—*Foster v. Athenæum*, 3 Ala. 302; *Walker v. Carroll*, 65 Ala. 61. There are some varying and conflicting decisions in England, on what is sometimes asserted as another exception to the rule. They are collected and commented on in 1 Leading Eq. Cases, 4th ed., pages 311* *et seq.* We deem it unnecessary to consider them, as the point of dispute and discrepancy arising in them is not presented in this case. They show, however, that whenever the conduct and dealings of the parties, in reference to the transaction, are not reconcilable with the idea that a lien was intended to be retained, then there is no lien.—See, also, 1 Jones on Mortgages, § 198; 3 Pom. Eq. Jur. § 1252, and notes. This court has gone very far in upholding the vendor's lien.—*Buford v. McCormick*, 57 Ala. 428; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33; *Young v. Hawkins*, at the present term.

This is the second time this case comes before us.—*McCarty v. Williams*, 69 Ala. 174. It is contended for appellant, that his amendment of the bill, after the case returned to the Chancery Court, takes it out of the operation of the principles declared on the former hearing. The most important of the amendments is, that when the compromise was made, and the new note given, the original purchase-money notes, signed by all the purchasers, were not surrendered, and are still in the possession of the complainant. Now, if those original notes are binding at all, they are binding on all the parties, and operate a lien on all the land. This would hardly be contended for. And if proceedings were instituted upon them, the other four purchasers could successfully defend both themselves and their lands against recovery. The true construction of the compromise contract is, that Williams agreed to surrender the original purchase-money notes, to convey the land, and to trust the five several purchasers, each for his share or proportion of the bal-

[Crockett v. Lide.]

ance of the purchase-money. In support of this view, it is shown in the bill that McCarty represented to Williams that a sufficient sum was due him, McCarty, from his ward, whose estate Williams held, to pay such agreed balance; and the bill avers that Williams, relying on McCarty's representation, accepted the individual note of McCarty. This, we think, amounts to a novation, and repels all idea that any lien was retained. We adhere to our former views.—*McCarty v. Williams*, 69 Ala. 174; *Sims v. Sampey*, 64 Ala. 230; s. c., 58 Ala. 588; *Thames v. Caldwell*, 60 Ala. 644.

The decree of the chancellor is affirmed.

Crockett v. Lide.

Action on Promissory Note, by Assignee against Maker.

1. *Rents and profits of wife's equitable estate.*—As to her equitable separate estate, a married woman is regarded as a *femme sole*, and has the same power of dominion over the rents and profits as over the *corpus*; although her husband is her trustee, when no other trustee is appointed by the instrument creating the estate, and must sue at law for the recovery of the property.

2. *Same; presumption of gift to husband.*—The wife may make a gift to her husband of property belonging to her equitable estate, whether it be part of the *corpus*, or of the rents and income; and when she permits him to collect and receive the rents, and use or convert them to his own use during the coverture, a gift of them to him will be presumed after the lapse of a reasonable time, in the absence of proof of an express dissent on her part; but, where a note is taken by the husband, for the rent of lands belonging to the wife's equitable estate, payable to himself, and is transferred by him before maturity, the wife may assert her right to the rent, as against the assignee of the note, on the death of the husband before its payment or maturity; and a payment to her will protect the maker against an action by the assignee, when it is not shown that she had, during the life of the husband, notice or knowledge of the assignment.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JNO. P. HUBBARD.

This action was brought by Mary A. Lide, against Essex Crockett; was commenced by original attachment, sued out on the 4th October, 1880; and was founded on the defendant's note for \$75, which was dated January 12th, 1880, payable on the 1st day of November then next, to B. Temple, by whom it was transferred to plaintiff, and purported on its face to be given "for land rent." The defendant pleaded, "in short by consent, 1st, *non assumpsit*; 2d, payment; and, 3d, a special

[Crockett v. Lide.]

plea, verified by the oath of *E. M. Temple*, which alleged that the plaintiff had no right to maintain the action, and was not the party really interested in the cause of action. The cause was tried on issue joined, and, under the charges of the court, resulted in a verdict and judgment for the plaintiff.

“On the trial,” as the bill of exceptions states, the plaintiff having read the note in evidence, “the defendant then proved that, with notice of plaintiff’s claim, he had paid the amount of said note, before the commencement of this suit, to Mrs. *E. M. Temple*, who was then the widow of said *B. Temple*, and was his wife at the time of the execution of said note; and that said payment was made after the death of said *B. Temple*, which occurred in June, 1880. It was proved, also, that said note was given for the rent of certain lands belonging to Mrs. *E. M. Temple*, of which plaintiff had knowledge, held by her under a certain deed (which was in evidence), executed on the 27th December, 1870, and duly recorded on said day, the *habendum* clause of which was in these words: ‘To have and to hold to her, the said Evelyn M. Temple, to her sole, separate and exclusive use, forever, free from all and every debt, liability and contract of her husband, the said Bellville Temple, or of any future husband.’ It was in proof, also, that on the 26th January, 1880, the plaintiff received said note and another from said *B. Temple*, as collateral security for the payment of \$150, loaned money; that Mrs. Temple was not in this State when said transfer was made; that she never consented to it, or ratified it, and had no knowledge of it until after the death of her said husband. It was in proof, also, that Mrs. Temple and her said husband were married prior to 1870, and lived together as man and wife up to the time of his death; that one of the rent notes was used by him in 1873, with her consent, to purchase supplies from Munter; that another was used in a subsequent year, with her consent, with one Steiner, for supplies; and that two others were used in subsequent years, without her knowledge or consent, one with Pierce, and another with Dean. These notes were all taken payable to the said *B. Temple*, and there was no evidence of any dissent on the part of Mrs. Temple to said *B. Temple* taking said notes payable to himself, or of his using them; but she had no knowledge how he used said notes, other than as above stated.

“The court charged the jury as follows: If the jury find, from the evidence, that *Dr. B. Temple*, to whom the note was payable, and Mrs. *E. M. Temple*, were husband and wife, and were living together as husband and wife at that time, and were married prior to 1870; and that *Dr. B. Temple* received the rents of the lands from year to year, and there is no evidence of any express dissent on her part; it would be presumed to

[Crockett v. Lide.]

have been with her consent, and is regarded as a gift to her husband; and if the jury further find, from the evidence, that said note was delivered by Dr. Temple to the plaintiff, in January, 1880, as collateral security for a loan of \$150, and the defendant had notice, before he paid said note to Mrs. Temple, that it was thus held by the plaintiff, then the plaintiff is entitled to recover."

The defendant duly excepted to this charge, and requested several charges in writing, among which was the following: "3. The husband has no more right to anticipate the income of the wife's separate equitable estate, by taking notes therefor and transferring them, for the rent of one year, than he has to do so for the rent of twenty years; and any one claiming the rent falling due after the husband's death, on such a note, must show an authority from the wife to the husband to make the transfer." The court refused this charge, and the defendant excepted to its refusal; and he now assigns as error the charge given, and the refusal of the several charges asked.

SAYRE & GRAVES, for appellant.—At common law, the husband acquired by the marriage an estate in the lands of the wife during coverture at least, and consequently in its rents and profits; and this estate might be sold under execution against him. But this estate, unless enlarged into an estate for life, ended when the coverture ceased; and on the death of the husband, the wife's right to the unpaid rents became absolute: the accruing rent was a *chose in action*, and survived to the wife. *Bibb v. McKinley*, 9 Porter, 641. But, under the deed to Mrs. Temple, she held the land as a separate equitable estate, in which the husband had no estate or interest—neither in the land itself, nor in the income and profits.—*Roper v. Roper*, 29 Ala. 251. If the husband had collected the rents, and had used the money, with the knowledge of the wife, and without objection on her part, a gift to him might be presumed, as in the case last cited. But the facts shown by the record leave no room for such presumption. The note was a mere *chose in action*, and was transferred before maturity; the husband died before it became due; the transfer was made without the knowledge or consent of the wife, and the transferee knew that it was given for the rent of her land. The transfer passed only the interest of the husband, if any thing; and can not prevail against the claim of the wife, who might have enjoined the collection of the note by the husband himself. The fact that she permitted him to use certain other notes, given for rent, for a special purpose, repels the idea that he had any general power to use her notes, or this particular note, for his own purposes. As to the husband's right to assign the wife's

[Crockett v. Lide.]

chooses in action, and as to the effect of such assignment on the rights of the wife, see *George v. Goldsby*, 23 Ala. 332; *Purdew v. Jackson*, 1 Russ. (Eng. Ch.) 42; *Honner v. Morton*, 3 *Ib.* 65.

CLOPTON, HERBERT & CHAMBERS, *contra*.—Where husband and wife are living together, and he collects or receives the income and profits of her equitable estate, it will be presumed to have been done with her consent, in the absence of an express dissent on her part, and will be regarded as a gift to him. *Roper v. Roper*, 29 Ala. 247, and authorities there cited; *Andrews v. Huckabee*, 30 Ala. 143; 2 Bright on H. & W. 259; *Beresford v. Armagh*, 13 Sim. 643. In aid of this presumption, in this case, it was shown that the husband had taken the notes for rent, year after year, payable to himself, and had used them with the wife's consent.

SOMERVILLE, J.—The only question raised involves the right of the husband to transfer the *rents* of the wife's *equitable* separate estate, without her express consent, and by way of anticipation before such rents are actually due and payable. The note sued on was given for the rent of the wife's land for the year 1880, being made payable to the husband, on the first day of November of that year. He transferred the note to the plaintiff, for value, without the knowledge or consent of the wife. He died in June of the same year, before the note became due; and, upon the claim of the widow, the tenant paid the rent in controversy to her, refusing to recognize the validity of the transfer. This payment is set up as a defense in the present action on the rent-note, and was sustained by the court below.

If the consideration of the note had been the rents of the wife's *statutory* separate estate, and it had been *due*, so as to sever it from the reversion, it may be that a recovery might be had, under the previous decisions of this court.—*Westmoreland v. Foster*, 60 Ala. 448; *Lee v. Tannenbaum*, 62 Ala. 501. This, however, is not the question, as the rights and authority of the husband, in respect to these two classes of separate estates, are entirely different. Where no other trustee is named in the instrument creating an *equitable* separate estate to the wife's sole and separate use, the law appoints the husband as such trustee; and the legal title of the property vests in him, in all cases, where he reduces it to possession, so that he alone must sue for its recovery at law.—*Pickens v. Oliver*, 29 Ala. 528; *Friend v. Oliver*, 27 Ala. 532; *McCall v. Jones*, 72 Ala. 368. He has no interest in such property in his own right, or other than as trustee.—2 Kent's Com. 162. It can not be subjected to the payment of his debts by his creditors, without the consent of

[Crockett v. Lide.]

the wife.—*Calhoun v. Cozens*, 3 Ala. 498; *Flanagan v. State Bank*, 32 Ala. 508. If, by the wife's consent, he undertakes to control and manage the property, he does so in his capacity as trustee, and it is his duty to collect and *preserve* the income and profits.—1 Bish. Marr. Women, § 801. He is not permitted to usurp her right of dominion or management, however, without her acquiescence.—*Roper v. Roper*, 29 Ala. 247. If he appropriated such rents or profits to his own uses, he, or his personal representative, can be held to account to the wife for them, provided she satisfactorily prove her *dissent* from, or objection to such appropriation.—*Allen v. Terry*, 73 Ala. 123. If he collects such rents or income, he may, like any other trustee, be ordered by a court of equity to pay the proceeds over to the wife, unless it can be inferred that the wife has precluded her rights by a *donation* of them to him.—*Collins v. Collins*, 2 Paige, 9. The wife, in other words, is the owner of the rents and income of her equitable separate estate, just as fully as of the *corpus* of such property, and she has the same power of dominion over them. She may deal with such property as a *femme sole*, possessing the unquestionable authority to charge, transfer, mortgage or convey it without the husband's concurrence.—*Short v. Battle*, 52 Ala. 456. She may, however, make a *gift* of her separate estate to her husband, just as she may to any other person, the courts always exercising a proper watchfulness over such transactions, based upon the apprehension and frequent danger of undue influence.

So far as concerns the *income and profits*, the rule is settled in this State, as elsewhere, that if the husband reduces them to possession, and uses or converts them to his own use, during the continuance of coverture, and while he continues to reside with the wife, it will be presumed, after the lapse of a reasonable time, and in the absence of *express dissent* on her part, to have been with her consent, and will be regarded as a *gift* to him.—*Roper v. Roper*, 29 Ala. 247; *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 202; Hill on Trustees, 425-6. This is quite as far as the authorities seem to have carried the principle.

It is obvious that there can be no gift from one person to another, without the mutual consent and concurrent will of both parties. The donor must intend to part with the dominion as well as the possession of the thing donated. The above rule of law is one merely of presumptive evidence. If the rents or income of the wife's equitable separate estate, *as such*, be collected in money or property, and be converted by the husband after coming into his possession, there prevails a presumption of the wife's consent; and if she fails to dissent from such appropriation within a reasonable time, her silence

[Ryan v. Beard's Heirs.]

will be construed into a ratification of the conversion, and this will constitute a gift. The policy of the rule is to preserve domestic peace and promote domestic harmony in the marital relationship.

The rent-note in controversy is shown to have been taken payable to the husband of Mrs. Temple, but no inference of a gift to him by her can be properly drawn from this fact, even if the wife had knowledge of it, which is not proved. The note was not the rent itself, but only a written promise to pay it. It was no breach of trust that the husband should have taken it payable to himself. This he must be presumed to have done as *trustee* or *agent* of the wife, being fully authorized by law, in this capacity, to manage the wife's separate estate by her consent and acquiescence.—1 Whart. Contr. § 85; 1 Bish. Marr. Women, § 801.

It is shown, also, that the wife was ignorant of the fact that the note had been transferred by her husband to the plaintiff, until after the husband's death. Nor is there any evidence showing her ratification of, or consent to such transfer. In view of her ignorance, therefore, it can not be maintained with any show of reason that there was a gift of *the note*. She had no reason to apprehend that he had transferred it, or otherwise converted it to his own use. Hence no room remains for any inference of a donation, based upon consent, express or implied.

In view of these principles, the plaintiff, under the evidence set out in the bill of exceptions, was not entitled to recover. The court erred in refusing the third charge requested by the appellant. The other rulings we need not consider.

Reversed and remanded.

Ryan v. Beard's Heirs.

Statutory Real Action in nature of Ejectment.

1. *Admission as to testimony of absent witness.*—An admission, made for the purpose of preventing a continuance, that an absent witness would, if present, testify as set forth in the affidavit submitted, is not an admission of his competency, nor of the relevancy of the facts as evidence; nor is it admissible, for any purpose, on a trial at a subsequent term, although the witness has since died.

2. *Decree in chancery cause; effect as against third person, not party to suit.*—A decree in a chancery cause, under a bill filed by trustees for directions as to the rights of the parties claiming under the deed, and for a settlement of the trust, vesting in one of the claimants all the right and title of the grantor at the time the deed was executed, does not

[Ryan v. Beard's Heirs.]

affect the claim or title of a third person, who was not a party to the suit, and who does not claim under the deed.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. LEROY F. BOX.

This action was brought by Samuel F. Ryan, against Arthur C. Beard and Columbus Kilpatrick, to recover the possession of a tract of land, with damages for its detention; and was commenced on the 18th December, 1876. Beard died pending the suit, and it was thereupon revived against his heirs and personal representative, Kilpatrick being in possession as the tenant of Beard. The land sued for was described in the complaint as "the north-west part (B) of fractional section seventeen (17), township seven (7), range four (4), east, containing seventy-nine (79) acres, more or less." The defendants pleaded the statutes of limitation of ten and twenty years, and adverse possession for three years, with a suggestion of the erection of valuable improvements; and the cause was tried a second time on issue joined on these pleas, as on the former trial shown by the report of the case when before this court during its December term, 1880.—*Ryan v. Kilpatrick*, 66 Ala. 332-38.

The plaintiff claimed the land as a part of the plantation which, with slaves and other property, was conveyed by one Gabriel M. Moore, by deed dated March 9th, 1850, to P. M. Bush and Samuel Finley as trustees, in trust for the support and maintenance of himself and his family, which then consisted of his wife and one child, during the joint lives of himself and wife; with a further provision, that, on his death, "the trust estate hereby created is to be distributed among the children of the said Gabriel and the said Joanna [his wife] according to the provisions of the statutes of descent and distribution of the State of Alabama now in force." The lands conveyed by the deed were therein thus described: "Those certain tracts or parcels of land lying and being in said county of Marshall, purchased by him of William Robinson and P. M. Bush, and comprising the plantation on which the said Gabriel now resides, and containing about ten hundred and thirty-five acres." On the trial, as the bill of exceptions states, the plaintiff read this deed in evidence, "and then introduced, without objection, oral evidence tending to show that the land sued for is embraced in the body of land described in said deed, and that said trustees, Bush and Finley, held said land in connection with, and as part of the lands described in said deed." The defendants contended that the land was not embraced in the tract conveyed by said deed, and they claimed it under a purchase by Arthur C. Beard from Hardy H. Moore, who was the brother of said Gabriel M. Moore, and of Beard's wife; their evidence

[Ryan v. Beard's Heirs.]

tending to show that Hardy H. Moore held under a patent from the United States, issued in 1831, and sold to Beard prior to 1835.

"It was proved that said Gabriel M. Moore died in January, 1852, leaving his widow, Mrs. Joanna Moore, and two infant children, Mary and William P.; that Mrs. Joanna Moore, in 1854, married one John Ryan, by whom she afterwards had one child, the plaintiff in this suit; that said Mary died a short time after the birth of said plaintiff, and said William P. died a short time afterwards, before the death of his mother, said Joanna, who died in October, 1857." The plaintiff proved, also, that in February, 1857, after the death of said Mary and William P. Moore, "the trustees in the deed of trust filed their bill in the Chancery Court of Marshall, to obtain a judicial construction of said trust deed, and for a settlement of their said trust." The bill is here set out in the bill of exceptions, without other reference to it, and is followed by the several decrees rendered in the cause. Mrs. Joanna Ryan (formerly Moore), the plaintiff in this suit, and the personal representative of the two deceased children, Mary and William P. Moore, are made defendants to the bill; and its prayer is, that the conflicting interests of the defendants, and particularly of the plaintiff and his mother, in and to the real and personal property conveyed by the deed, may be ascertained and declared by the decree of the court. At the June term, 1857, the chancellor rendered a decree, declaring that, under the provisions of the deed, and on the facts stated, one-third of the property conveyed by the deed, real and personal, was vested absolutely in Mrs. Joanna Ryan, and two-thirds of the real property was vested in Samuel F. Ryan, the plaintiff in this suit; but, by a subsequent decree, rendered as of the November term, 1857, after the death of Mrs. Ryan, it was declared that her interest was only a life-estate in the lands, and that the entire interest became vested in Samuel F. Ryan on her death. These decrees are set out in the bill of exceptions, but it is not stated that they were offered or read in evidence by the plaintiff.

"The defendants then offered in evidence a written statement, which had been prepared and used in evidence on the trial of said cause in January, 1879, which was so prepared and used as evidence on said former trial as an admission on the part of the plaintiff as to facts which would have been deposed to by said P. M. Bush, an absent witness, if he had been present at said former trial; and proved that said Bush, since said former trial, had died; and offered said statement as an admission by plaintiff as to the evidence of said Bush in regard to the matters and things set out in said statement." It was stated in this affidavit, among other things, that said Bush would, if

[Ryan v. Beard's Heirs.]

present, testify that the land sued for was not embraced in the tract conveyed by Gabriel M. Moore to Finley and Bush as trustees, and was never claimed or occupied by them as trustees; that it had belonged to Hardy H. Moore, who sold it to said Arthur C. Beard; and that he had rented it from Beard, and occupied it several years as his tenant. The plaintiff objected to the admission of this statement as evidence, and reserved an exception to the overruling of his objection.

The plaintiff asked the following charges, which were in writing, and which the court refused to give: 1. "Said chancery decree divested the legal title to the lands described in said deed of trust to Finley and Bush, out of said trustees, and vested the legal title thereto in said plaintiff, from the date of said decree." 2. "The decree of the Chancery Court, read in evidence in this cause, fixed the legal title of the lands described in said deed to Finley and Bush, in the plaintiff in this suit, and that the possession of said land after the date or rendition of said decree, by John Ryan or any other person, was in law the possession of said plaintiff during his infancy." The plaintiff excepted to the refusal of each of these charges, and he now assigns their refusal as error, together with the rulings of the court on the evidence to which he reserved exceptions.

ROBINSON & BROWN, and J. H. NORWOOD, for appellant.

CABANISS & WARD, *contra*.

STONE, J.—At a former term of the court, defendants submitted an affidavit for a continuance, in which they set forth what they expected to prove by Bush, an absent witness, who had been summoned, but did not attend. For the purpose of obtaining a trial, plaintiff's counsel admitted that the witness, if present, would testify as therein set forth.—Rule of Practice in Circuit Courts, No. 16; Code, p. 160. Such admission is not an admission that the statements therein set forth are true, nor is it an agreed state of facts. The party making such admission is not even held to admit either the competency of the witness, or of the testimony. It is an admission he would so testify, and this the party admitting will not be allowed to controvert. He may, however, object to the competency of the witness, and to the legality of the evidence, or any part of it. So, he may disprove the facts the admitted testimony tends to prove. When such admitted affidavit is used on the trial, to prevent the delay of which the admission is made,—or if a continuance is otherwise had,—it can in no case be used in a subsequent trial, without the consent of opposing counsel. Its

[Cochran's Adm'r v. Sorrell.]

whole power and efficacy expire with the term at which it is given—with the trial it is intended to accelerate.—*M. & W. Plank-Road Co. v. Webb*, 27 Ala. 618; *Peterson v. The State*, 63 Ala. 113. This is not the case of proving what a deceased witness swore on a former trial.—1 Greenl. Ev. §§ 163 *et seq.* The Circuit Court erred in allowing the affidavit to be read as evidence, against the objection of plaintiff.

The chancery decree certainly vested in Samuel F. Ryan all the title, legal or equitable, which G. M. Moore had in the lands in controversy, at the time the deed was executed. Whether he had any title, or ever owned the lands in suit, was one of the controverted issues in the court below. Neither of the charges asked should have been given; for each asked the court to charge the jury, as matter of law, that the chancery decree vested the legal title to the lands in controversy in Samuel F. Ryan. Beard was not a party to the chancery suit, and any claim or title he may have had, was unaffected by that proceeding.—*Walker v. Elledge*, 65 Ala. 51.

The facts presented by this record are different from those shown on the former trial.—*Ryan v. Kilpatrick*, 66 Ala. 332. As the case now appears, the most material subjects of inquiry are, whether the land in controversy is embraced in the deed of G. M. Moore to Bush and Finley, trustees, and whether the possession of the premises was taken and held under that deed, or was in Arthur Beard.

Reversed and remanded.

Cochran's Adm'r v. Sorrell.

Petition by Widow for Allotment of Homestead Exemption.

1. *Contest of claim of homestead exemption; where tried.*—When objections are filed by the administrator to the widow's claim of a homestead exemption, or to the allotment thereof made by commissioners appointed by the Probate Court, that court has no power to try the issue (Code, §§ 2838, 2841), but should certify it to the Circuit Court for trial.

APPEAL from the Probate Court of Calhoun.

Heard before the Hon. A. Woods.

The record in this case shows that, on the 14th June, 1882, Mrs. M. C. Sorrell filed her petition in said Probate Court, claiming a homestead exemption in the lands of her deceased husband, S. D. Cochran, for the benefit of herself and two infant children who resided with her, and praying the ap-

[Loeb & Weil v. Richardson.]

pointment of commissioners to set apart and allot such homestead to her; that said court, on the same day the petition was filed, appointed six commissioners to make the allotment (three in Cleburne county, and three in Calhoun, in which two counties the lands were alleged to be situated), and directed them to report their proceedings to the court on or before the 15th July, 1882; that said commissioners made and filed their report on the 7th July, and the court appointed August 19th for the hearing of it; that on the 22d July, W. W. Whiteside, the administrator of said Cochran's estate, filed his petition in the court, asking to strike from the files the petition of the widow, and to set aside the proceedings had under it, and the court thereupon appointed the 19th August for the hearing of his petition; and that on said 19th August, the two matters coming on to be heard together, the court overruled the administrator's objections, dismissed his petition, and confirmed the report and allotment of the commissioners. The administrator duly excepted to these rulings, and he now assigns them as error.

PARSONS, PEARCE & KELLY, for appellant, cited *Kelly v. Garrett*, 67 Ala. 304.

PER CURIAM.—The decree of the Probate Court must be reversed, on the authority of *Kelly v. Garrett*, 67 Ala. 304; *Baker v. Keith*, 72 Ala. 121; and *Farley v. Riordon*, 72 Ala. 128. Exceptions or objections to the allotment of a homestead having been interposed by the administrator, it was the duty of the Probate Court to have certified them to the Circuit Court for trial, and not to have entertained jurisdiction to hear and determine them.

Reversed and remanded.

Loeb & Weil v. Richardson.

Bill in Equity by Widow, against Administrator, for Exempt Personal Property.

1. *Exemption of personal property, in favor of widow; priority over other claims.*—The claim of the surviving widow to an exemption of personal property in the estate of her deceased husband, as secured to her by statute (Code, §§ 2825-26), is paramount to the rights of the personal representative for the general purposes of administration, and to pre-

[Loeb & Weil v. Richardson.]

ferred debts of the estate; but it does not override liens created by law, or by the contract of the husband while in life.

2. *Judicial notice of matters connected with crops.*—The court takes judicial notice of facts which are matters of common knowledge,—“so common that all persons must be presumed to be cognizant of them;” as, that a crop of cotton has been planted, and was growing but immature, on the 13th May, and that it was still immature on 20th June.

3. *Administrator's statutory authority to complete and gather crop.*—An administrator has statutory authority “to complete and gather” a crop planted and commenced by the decedent while in life (Code, §§ 2439-40), which necessarily includes the incidental power to procure and furnish means necessary to that end; and the crop thus made becomes assets of the estate, “the expenses of the plantation being deducted therefrom.”

4. *Same; expenses of crop; rent and advances; exemption to widow.* Where the intestate had executed a note and mortgage on his crop, to be grown on rented lands, with other personal property, for advances to be made to enable him to make the crop, and died while the crop was growing but immature; and one of the mortgagees thereupon took out letters of administration on his estate, and completed and gathered the crop with moneys furnished by them; he has the right to reimburse himself out of the first proceeds of the crops, but not under the mortgage, for the moneys thus furnished and expended; and must then pay the rent, if any is due, and the debt for advances made to the intestate himself under the mortgage; and these debts are paramount to the widow's right of exemption in the personal assets of the estate.

5. *When widow, claiming exempt personal property, may come into equity.*—“The court will not say there may not be cases in which equity would interfere, at the instance of the widow, to enable her to make her selection of exempt personal property and have it made available;” but, when her bill fails to show any remissness, undue delay, or other dereliction of duty on the part of the administrator, it is without equity.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. THOS. M. ARRINGTON.

The appeal in this case is sued out from a judgment or decree of said court, sitting in equity, overruling a motion to dismiss the bill for want of equity; and that decree is assigned as error. The facts are stated in the opinion of the court.

SAYRE & GRAVES, for the appellants.—The bill is wanting in equity. If the complainant has any right of exemption in the crops, it is a legal right, and can only be asserted in the Probate Court,—*O'Conner v. Chamberlain*, 59 Ala. 431; *Gilbert v. Dupree*, 63 Ala. 331; *Janney v. Buell*, 55 Ala. 408. The widow has no right to any part of the personal property, until she has made her selection from the property included in the inventory (Code, § 2825); yet the bill does not allege that any inventory has been filed. If the administrator failed or refused to return a proper inventory, the Probate Court had authority to compel him; and if the widow was prevented from making a selection by any act of his, her remedy was by *mandamus*. But it is insisted that, before the widow can claim any part of the crops as exempt, the expenses incurred in making and gathering them, and the advances made under the

[Loeb & Weil v. Richardson.]

mortgage, must be first paid.—Code, §§ 2439–40. There is no allegation in the bill that these prior charges have been paid, nor that any balance will remain after they have been paid.

SMITH & MACDONALD, and TROY & TOMPKINS, *contra*.—The complainant's right to select personal property of the estate of her deceased husband, to the amount of \$1,000, as exempt from administration, can not be questioned. The bill alleges that she has applied to the administrator to be allowed to make the selection, and that he has refused to allow it; and it states facts which show that, by his fraudulent conduct, he has placed the property beyond his reach. Until she has made her selection, the widow has no title to any specific property, on which she can maintain an action at law.—*Tucker v. Henderson*, 63 Ala. 280. Nor has the Probate Court any jurisdiction of the selection and allotment.—*Ex parte Reavis*, 50 Ala. 212. If the complainant can not have relief in a court of equity, the bill presents the anomaly of a right without a remedy.

STONE, J.—In January, 1883, Julius Richardson executed two mortgages to Loeb & Weil, to secure to them the payment of two notes, amounting to four hundred and fifty dollars, with a provision for further advances, to the extent of one hundred dollars. These, to enable Richardson to make a crop on the plantation of which he was tenant. The subject of the mortgage was the crops to be grown, four mules, and a wagon. About 15th May, 1883, Richardson, the mortgagor, died, intestate; and on 20th June, 1883, Michael Loeb, of the firm of Loeb & Weil, was appointed administrator of the estate. He, the administrator, proceeded to complete the crop, making, as is averred, both cotton and corn, which he has in possession, or in possession of Loeb & Weil.

The bill in this case was filed on 29th November, 1883, by the widow of Richardson, the mortgagor, against Loeb as administrator, and against Loeb & Weil as partners. It avers that, at the time of Richardson's death, he had obtained only fifty dollars of advances on his mortgages, and that the administrator continued to obtain advances from himself and partner, to make the crop. It then avers that the administrator had no legal authority to obtain advances under the binding security of the mortgages. The prayer of the bill is, that the defendants be coerced to produce the assets of the estate, that the widow may select therefrom the one thousand dollars in value of personal property, which the statute exempts for her benefit. The bill avers that decedent left no lineal descendant; leaving only a widow, without child.

As we understand the theory on which this bill was filed, it

[Loeb & Weil v. Richardson.]

claims that after the fifty dollars of advances obtained on the mortgage security, by Richardson in his life-time, the widow's claim of exemption is the next preferred claim. This is an entire misapprehension of the law. True, the widow's exemption, as a general rule, overrides the rights of the administrator, for general purposes of administration. Its claims are paramount to those of preferred debts, as between her and the claimants of such debts. But such claim does not override liens created either by the law, or by the contract of her deceased husband, entered into in his life-time. There is no law prohibiting the husband from incumbering his personal property, independently of any objection his wife can interpose.

Drawing our conclusions from knowledge which must be regarded as common—so common that all persons must be presumed to be cognizant of it—we hold that when Richardson died, May 15, the crops had been planted, were growing, but had not matured; and that they were still immature, when the administration was committed to Loeb, June 20. The crop being “commenced by the decedent,” the administrator was authorized to “complete and gather” it.—Code of 1876, § 2439. Being clothed with this power, he was incidentally and necessarily clothed with the power of procuring and furnishing the means necessary to that end. The crop thus made became assets of the estate, “the expenses of the plantation being deducted therefrom.”—Code, § 2440. The administrator may sell the crops at private sale.—Code, § 2441.

Applying clear principles to this case, we hold, that the administrator was authorized to furnish supplies reasonably necessary to complete and gather the crop commenced by the decedent, and to reimburse himself therefor, out of the first proceeds of the crop; second, to pay rents of the lands, if any due; third, to pay out of the residue of the crop, if any, and out of the other mortgaged property, any sum that may be due on the mortgages. Under this third head, however, he can claim nothing under his mere mortgage lien, for advances made after the death of Richardson. His claim for these must come in, if at all, under the first head, above noted. If, after satisfying these claims, there is any thing left, the widow's claim of exemption is next in order. At that stage, she has a clear right to make her selection, of the undisposed of residuum.

We will not say there may not be cases in which chancery would interpose, to enable the widow to make her selection, and to have it made available. It is the duty of the administrator to perform the functions above pointed out, within a reasonable time. Should there be remissness, undue delay, or other dereliction of duty, it is possible chancery would interpose and grant relief, as in many other cases connected with

[Pruitt v. McWhorter.]

administrations. The bill found in the present record makes no such case. It was filed about, or before, the time the harvest of the cotton crops is usually completed. No charge is made, or can reasonably be made, that the administrator had unduly delayed in the performance of his duties, above enumerated. The bill is wanting in material averments, and was prematurely filed. The motion to dismiss should have prevailed; and, under the facts set forth, it is not susceptible of amendment, so as to give it equity.

The decree of the City Court, sitting in equity, is reversed, and a decree rendered, dismissing complainant's bill, but without prejudice to her right to file another bill, should the occasion arise.

Reversed and rendered.

Pruitt v. McWhorter.

Bill in Equity for Settlement of Partnership Accounts.

1. *Exceptions to register's report.*—Exceptions to the register's report, on the statement of an account, if not accompanied by a note of the evidence relied on to support them (Rule No. 93; Code, p. 174), may be overruled.

2. *Original documents; how brought to appellate court.*—Original books and papers may be sent up to this court for inspection, by order of the court below (Rule No. 20; Code, p. 157); but this does not authorize their omission from the transcript as a part of the record; and while the parties may, by agreement of record (71 Ala. iv.), omit from the transcript such parts of the proceedings as are deemed immaterial to the proper consideration of the questions presented by the appeal, there is no rule of practice which authorizes the omission, by agreement, of documents deemed material, and the substitution of the originals for the consideration of this court.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by McCormick Pruitt, against R. S. McWhorter, and sought a settlement of the accounts of a partnership in merchandizing, which had existed between the parties under the name of McWhorter & Pruitt. After answer filed, the chancellor ordered a statement of the accounts by the register; and several exceptions to his report, as to contested items in the account, were reserved by each of the parties. The chancellor overruled all of the complainant's exceptions, eight in number, and all of the defendant's except one; and

[Pruitt v. McWhorter.]

the report being corrected as to this item, and confirmed, he rendered a decree against the complainant, in favor of the defendant, for \$218.76, the balance ascertained to be due on the statement of the account. The complainant appeals from this decree, and here assigns it as error, together with the overruling of each of his exceptions to the register's report. There is an agreement of record, entered on the transcript, in these words: "It is agreed by the solicitors of both parties in this case, that the transcript made out by the register contains all the material orders, pleadings, and matters of evidence had in said cause, except those particular papers and instruments agreed to be left out of the same; and except the two books of account, called exhibits A and B respectively, which, it is agreed, may be carried before the Supreme Court, for separate inspection on the review of the same."

WATTS & SON, and G. COOK, for appellant.

R. M. WILLIAMSON, and W. R. HOUGHTON, *contra*.

SOMERVILLE, J.—We have examined the testimony contained in this record with great care, and can discover no error prejudicial to the appellant. The assignments of error are all based upon exceptions taken to the register's report. The findings of the register, so far as approved by the chancellor, seem to be sustained, in most cases, by a preponderance of the evidence. In no instance can we clearly see that any one of the exceptions is well taken. Many of these exceptions, moreover, are not taken in accordance with the requirements of the 93d Rule of Chancery Practice.—Code, 1876, p. 174; *Mooney v. Walter*, 69 Ala. 76; *Crump v. Crump*, *Ib.* 156; *Vaughan v. Smith*, *Ib.* 92.

We can not look to the original books of partnership accounts, which are omitted from the transcript, and are agreed to be sent up to this court as a part of the testimony in the cause. There is no rule of practice which authorizes material evidence, relied on as testimony, in support of exceptions taken or otherwise, to be omitted from the regular transcript, and substituted by the original papers, transmitted to this court as evidence by agreement of counsel.

The 20th Rule of Practice authorizes the transmission of original papers to the appellate court, only when, in the opinion of the judge, or chancellor, it is deemed necessary, for some special reason, that they should be inspected by the judges of this court. It is only when the proper order is made that such papers can be considered by us, "in connection with the transcript of the proceedings."—Rule of Practice No. 20; Code,

[Lewis v. Bruton.]

1876, p. 157. This rule, it is obvious, does not authorize the omission of such papers or documents from the transcript. They should be copied there, in all cases, where they constitute material testimony, whether the originals are transmitted to the appellate court or not.

It is equally manifest that the Rule of Practice adopted by this court on April 25th, 1878, was not designed to cover a case of this kind. It was intended to authorize, by agreement of counsel, the abbreviation of records, brought to this court on appeal, by the omission of all irrelevant or redundant matter,—evidence which might be deemed by counsel to be unnecessary to be considered by this court, in deciding the particular questions brought up for review. This can be done by written agreement of counsel, “specifying what part of the proceedings shall be inserted in the transcript.”—Rule of Pr. No. —; 71 Ala. p. iv.

The decree is affirmed.

Lewis v. Bruton.

Action against Stakeholder, for Money deposited on Wager.

1. *Action for money paid on wager ; statutory provisions.*—The statute declaring all gambling contracts void, and giving an action to recover back money paid under them (Code, § 2131), applies only to actions between the parties to such contracts, and does not affect actions against stakeholder.

2. *Action against stakeholder, for money deposited on wager ; lies when.* When money is deposited with a stakeholder, on a wager, either party may withdraw from the illegal transaction, and demand the return of his money, at any time before it has been paid over to the winner after the result is ascertained ; and the loser may maintain an action against the stakeholder, if the latter pays the money to the winner after notice by the loser not to pay it.

3. *Same.*—The wager being on the result of a congressional election in a particular district, a payment by the stakeholder to the supposed winner after the result of the election is “generally known,” or “publicly announced,” but before the issue of an official certificate by the proper officer, is premature, and is no defense to a subsequent action by the loser, who, before the issue of the certificate, notified the stakeholder not to pay : but, *it seems*, the stakeholder may safely pay over the money after the official announcement of the result, without waiting for the decision of an uncertain contest.

4. *Judicial notice of contested election.*—The contested election between Gen. J. Wheeler and Col. W. M. Lowe, as member of Congress from the 8th district of Alabama, at the general election held in November, 1880, “is public, official history, of which the court takes judicial notice.”

5. *Sufficiency of complaint.*—In an action against a stakeholder, to recover money deposited on a wager, and by him paid over to the sup-

[Lewis v. Bruton.]

posed winner, it is not necessary that the complaint should, by its averments, negative the fact that the money was so paid before notice not to pay, that being defensive matter merely.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Joseph A. Bruton, against Joseph M. Lewis, to recover the sum of \$200, deposited by plaintiff with defendant, as a stakeholder, on a wager with Thomas H. Jones as to the result of the election between Gen. J. Wheeler and Col. W. M. Lowe, candidates for Congress from the 8th congressional district, at the general election in November, 1880; and was commenced on the 10th March, 1881. The first count of the complaint was in these words: "Plaintiff claims of defendant \$200, paid to defendant on the 25th October, 1880, as a wager between plaintiff and one Thos. H. Jones on the result of the election between Joseph Wheeler and William M. Lowe for Congress, from the 8th congressional district of Alabama, at the election held on the 2d November, 1880; and plaintiff avers that he has demanded said money from defendant, which he failed and refused to pay; and plaintiff claims and sues for the same, with the interest thereon." The defendant demurred to this count, "because it does not allege that plaintiff demanded said sum of money from defendant, as a stakeholder, before the same was paid over to the winner, or gave notice to the defendant not to pay the money over to the winner, or to any other person than plaintiff himself." The court overruled the demurrer, and the cause was tried on issue joined on the plea of the general issue, and on a special plea which averred that the defendant paid the money over to said Jones before any demand or notice by plaintiff.

The evidence adduced on the trial, as set out in the bill of exceptions, did not show on what day the money was paid by the defendant to said Jones, nor on what day the official certificate of election was issued to Gen. Wheeler. W. W. Simmons, a witness for plaintiff, testified, that he was in Courtland "a few days after the election was over, and heard plaintiff talking to said Jones; that plaintiff proposed to withdraw the bet; and that Jones replied, *Wheeler was elected, and Lewis had paid the money over to him.*" J. E. Galey, another witness for plaintiff, testified, that he went with plaintiff to see defendant, and heard him ask defendant for the money, and tell him not to pay it to Jones; and that plaintiff further said, in that conversation, "that he was willing to withdraw the bet, or to let it stand until after Col. Lowe had contested." As to the time when this conversation occurred, the witness said, that "he could not locate the time exactly, but he thought it was within a week after the election, though it might have been ten days

[Lewis v. Bruton.]

after the election." The defendant himself testified, as a witness in his own behalf, "that after the election was over, and after the returns had all come in, and it was ascertained and publicly announced that Wheeler was elected, Jones demanded the money which he held as stakeholder, and he paid it over on said demand; that he could not say positively how long after the election this occurred, but he thought it was from five or six to eight days; that he was certain the returns were then all in, and it was publicly announced that Wheeler was elected; that the returns from all the counties showed a majority for Wheeler, and it was notorious that he was elected; that plaintiff had not, at that time, in any way notified him not to pay the money to Jones, and he had not then heard that there was to be any contest." This was all the evidence adduced as to the time when the money was paid to Jones, or when the notice by plaintiff not to pay was given.

The defendant requested the following charges, which were in writing: 1. "If the jury believe that the defendant had paid the money over to Jones after the election of Wheeler was publicly announced, and before any demand for the money was made by plaintiff, or notice given not to pay it to Jones, then the plaintiff can not recover in this action." 2. "The certificate of election, when issued, takes effect by relation from the day of election, and that the defendant is protected by the certificate in the payment which he made." 3. "If the jury believe, from the evidence, that defendant paid the money to Jones after the election was over, and before he had notice from plaintiff not to pay it over, defendant is not liable in this action, and the jury will find a verdict for him." The court refused each of these charges, and the defendant excepted to their refusal.

The overruling of the demurrer to the complaint, and the refusal of the charges asked, are now assigned as error.

D. P. LEWIS, and J. WHEELER, for appellant.

W. P. CHITWOOD, *contra*. (No briefs on file.)

STONE, J.—We do not think section 2131 of the Code of 1876 exerts any influence in this case, except to the extent that it declares all contracts based on a gambling consideration to be void. The second clause of the section has reference to suits between the parties making the wager. It sheds no new light on the question of the stakeholder's liability.

The rule is general, both in England and in this country, that when a wager is made, and the stakes are deposited with a stakeholder, either party may, at any time before the result is ascertained, and the money paid over to the winner, withdraw from

[Lewis v. Bruton.]

the illegal transaction, notify the stakeholder, and demand and recover his deposit-money. Such is the general rule, and it has been long so settled in this State.—*Shackleford v. Ward*, 3 Ala. 37; *Ivey v. Pfifer*, 11 Ala. 535; *Davis v. Orme*, 36 Ala. 540; *Hawley v. Bibb*, 69 Ala. 52; 1 Whart. on Contr. § 452; 2 Pars. on Contr. 626; *Collamer v. Day*, 2 Verm. 144; *Tarleton v. Baker*, 18 Verm. 9; *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80; *Fisher v. Hildreth*, 117 Mass. 558; *Morgan v. Beaumont*, 121 Mass. 7. This rule is not universal. Whar. on Contr. § 452.

In the present case, the stakeholder, Lewis, paid the money to the supposed winner, before he was notified by his adversary not to pay it over. It does not seem to be disputed that Bruton did give Lewis notice not to pay the money over to Jones, the alleged winner. The contention is, that the payment was made after the result of the election was generally known, and publicly proclaimed.

Members of Congress are elected the first Tuesday after the first Monday in November.—Code of 1876, § 248. On the Saturday next after the election (an interval of four days), the probate judge and other named officers, as supervisors, are required “to make a correct statement, from the returns of the votes from the several precincts of the county, of the whole number of votes given therein for each office, and the person to whom such votes were given.”—Code of 1876, § 291. A certified statement of the vote cast in the county, as required above to be made by the supervisors, is to be forwarded by the probate judge to the Secretary of State, immediately, and on the same day (Saturday) the service is performed.—Code, § 292. “It shall be the duty of the Secretary of State, within ten days after receiving the returns of election from the probate judges of each county, to furnish, from a count of the actual vote cast, as the same appears by the returns certified to him, certificates of election to such persons as may be ascertained to be elected to any office in this State.”—Code, § 294. It is thus shown that the certificate of election may not, in fact, be issued by the Secretary of State, until sixteen or more days have elapsed, after the election has been held. Considering the many duties of the same kind, cast on the Secretary of State at the same time, and the uncertain time necessary for the various county returns to reach the Secretary of State, it is not reasonable to suppose the certificates of election will be made out in much less than ten, possibly fifteen days, after the day of election.

In the present record, there is an absence of proof when the certificate of election was issued—uncertainty as to the time when the money was paid by the stakeholder to the supposed winner, and when the notice was given by Bruton to him, not

[Lewis v. Bruton.]

to pay over the money to Jones. The reasonable inference from the testimony is, that both the payment and the notice not to pay preceded the issue of the certificate of election. The decision of these questions, however, is rendered unnecessary, as no ruling appears to have been made upon them. The charges asked and refused all ignore these questions, and claim a verdict for defendant, in the absence of such certificate, if the money was in fact paid before notice not to pay, and after the result of the election was "publicly announced." The certificate afterwards issued, it is contended, related back to the election, and cured the irregularity. We can not assent to this. A payment before certificate of election issued, is at the peril of the stakeholder; and if the authority to pay be revoked, or the payment countermanded, before the actual issue of the certificate, an action for money had and received lies against the stakeholder. The Circuit Court did not err in refusing the charges asked. Whether there was a sufficient revocation in this case, we do not consider, as the question is not raised. *Patterson v. Clark*, 126 Mass. 531.

We do not propose, in this case, to consider which of the opposing candidates was in fact elected. We are, in no sense, assuming to make ourselves judges of the election. As we understand the law, that question was not, and, at the time the money must have been paid over, could not have been raised. We take it for granted, if the certificate of election had been issued before notice was given to the stakeholder not to pay, the charges asked would have been rested on that hypothesis, and not on the weaker one, that the result had been "publicly announced." In fact, we presume the Circuit Court did correctly rule on all questions not excepted to, and thus brought before us. If the money had been paid over, and the result of the election officially declared by the Secretary of State, *before notice to the stakeholder not to pay*, we are not prepared to say this would not be a complete bar to the action, even though the money was paid before the result was officially ascertained. Such official ascertainment might heal the irregularity of premature payment, and close the door against any demand afterwards made.

In what we have said, we have confined our rulings to what is known as the officially proclaimed result. We have not considered the question of the contested seat, which is public, official history, of which we take judicial notice. If necessary, we would probably hold the stakeholder would be justified in paying over the money on the official announcement, without waiting for the uncertain result of an election contest.

The demurrer to the first count of the complaint was rightly overruled. Payment to the alleged winner, before notice not

[Robertson v. Black.]

to pay, was defensive matter, the averment and proof of which rested with the defendant. The deposit being for an illegal purpose, the depositor had till the last moment to withdraw from the transaction, by revoking the authority to pay.

Affirmed.

Robertson v. Black.

Final Settlement of Administrator's Accounts.

1. *Sufficiency of exception.*—It is the office of a bill of exceptions to point out, clearly and distinctly, the error of which the party complains; and a general exception to several rulings, one of which is free from error, or which are only objectionable in part, will not be sustained.

2. *Objection to credit claimed by administrator.*—When an administrator, on final settlement of his accounts, claims a credit for an account held by him against his intestate, part of which is barred by the statute of limitations, an objection to its allowance, not limited to the part which is barred, but addressed to the entire account, may be overruled entirely; and the same rule applies to an objection to the allowance of interest on the account, when part of it is a proper charge.

APPEAL from the Probate Court of Shelby.
Tried before the Hon. JAMES T. LEEPER.

BREWER & BREWER, and WATTS & SONS, for appellant.

STONE, J.—This is an appeal from the judgment of the Court of Probate, on the final settlement of the accounts of the appellee, as administrator of the estate of John Sansom, deceased. On the settlement, the appellee claimed a credit of two thousand dollars, upon an account for the care and support of the intestate, who was shown to have been an invalid, for the ten years immediately preceding his death. The undisputed facts were, that the support of the intestate was reasonably worth about two or three hundred dollars per year, for the first few years, and about five or six hundred dollars per year, for the last two years of his life. The appellee also claimed a credit for interest upon this account, from the death of the intestate, until the day of settlement. Both of these credits were allowed by the Court of Probate, against the objection of the appellant, who was the heir of the intestate. The single exception reserved to the rulings of the court is thus stated in the bill of exceptions: "To this ruling of the court, and to the allowance of said items of credit, the contestant excepted."

[Garland v. Watson.]

It is the office of a bill of exceptions clearly and distinctly to point out the error by which the party complaining claims to have been injured. If the exception is general, taken to several rulings of the court, and any one of them is free from error, the judgment will be affirmed.—*Smith v. Sweeney*, 69 Ala. 524; *McGehee v. State*, 52 Ala. 224. So, of an exception taken to a ruling of the court, sustaining or overruling an objection to the introduction of evidence in a mass; the court is not bound to distinguish between the legal and illegal parts. *Boswell's case*, 63 Ala. 307; 1 Brick. Dig. 886, § 1186.

In the present case, it is contended for the appellant, that that portion of the account which was for the support of the intestate prior to the three years next preceding his death, was barred by the statute of limitations of three years, and should have been disallowed by the court. We can not assent to this. The credit was claimed as an entirety; and it is not denied by the appellant, that the claim for compensation for the support of the intestate, for the three years next preceding his death, was a just, subsisting demand upon the estate, and that against it the statute had not perfected a bar. It was the duty of the appellant to have pointed out the portion of the account to which his objection was applicable; and not having done so, the court did not err in overruling it.

The same reasoning is equally applicable to the allowance of interest upon the account, from the death of the intestate, to the day of settlement. He was, to say the least, entitled to interest upon the amount due him for the support of the intestate, for the last three years.—*Parker v. Parker*, 33 Ala. 459. The objection to the allowance of the interest, as that to the principal, was to it as a whole, not distinguishing between the part which was, and that which was not, barred by the statute of limitations.

We find no error in the record, and the judgment of the Court of Probate is affirmed.

Garland v. Watson.

Bill in Equity to set aside Sale under Power in Mortgage, at which Mortgagee became Purchaser.

1. *Purchase by mortgagee at sale under mortgage; election and remedies of mortgagor.*—When lands are sold under a power contained in a mortgage, and the mortgagee himself becomes the purchaser at the sale, the mortgagor has an election, if seasonably expressed, either to affirm or

[Garland v. Watson.]

disaffirm the sale, without regard to its fairness, or to the sufficiency of the price paid; but a bill which merely seeks to set aside the sale, alleging nothing as to the state of the account, containing no tender or offer to pay what is due, or to do equity, and not asking to redeem, is without equity.

APPEAL from the Chancery Court of Franklin.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 31st March, 1879, by B. R. Garland, against Robert H. Watson; and sought to set aside a sale of lands under a power contained in a mortgage, made by said Watson as mortgagee, and at which he became himself the purchaser. The mortgage was dated March 20th, 1877, and was given to secure the payment of a promissory note for \$4,707.53, which became due and payable on the 1st January, 1878; and it contained a power of sale, if default should be made in the payment of the note at maturity. The sale was made on the 8th April, 1878, after notice as prescribed by the mortgage; the mortgagee becoming the purchaser, at the price of \$5,300, and executing a conveyance to himself as purchaser. The bill alleged that the lands would have brought a better price, if they had been subdivided and sold in parcels; and prayed to have the sale set aside on that account, and because the mortgagee himself became the purchaser. On final hearing, on pleadings and proof, the chancellor dismissed the bill, and his decree is now assigned as error.

L. P. WALKER, for appellant.—When a mortgagee purchases at his own sale, under a power contained in the mortgage, a court of equity will set aside the sale, and order a re-sale, on the timely application of the mortgagor, without any inquiry into the fairness or regularity of the sale; the principle being, that the mortgagee is a trustee, and can not take advantage of his position.—*Charles v. DuBose*, 29 Ala. 367; *Andrews v. Hobson*, 23 Ala. 219; *Carter v. Thompson*, 41 Ala. 375; *McLean v. Presley's Adm'r*, 56 Ala. 211; *Robinson v. Cullom & Co.*, 41 Ala. 691; *Hawkins v. Hudson*, 45 Ala. 482; *James v. James*, 55 Ala. 530; *McGehee v. Lehman, Durr & Co.*, 65 Ala. 316; *Dozier v. Mitchell*, 65 Ala. 511; *Adams v. Sayre*, 70 Ala. 318; *Campbell v. Walker*, 5 Vesey, 680; *Harris v. Miller*, 71 Ala. 26. A sale under the power in a mortgage is the equivalent of a foreclosure suit.—*McGuire v. Van Pelt*, 55 Ala. 344. The only remedy of the mortgagor against an irregularity in a foreclosure suit, is an application to have the sale set aside, and a re-sale ordered: he has no right to redeem under the mortgage.—2 Jones on Mortgages, § 1054; *Brown v. Frost*, 10 Paige, 243. Having no right to redeem, no offer to redeem was necessary on his part.

[Garland v. Watson.]

WATTS & SONS, and EMMETT O'NEAL, *contra*.—The bill was wanting in equity, because there was no offer to redeem. It simply asked to set aside the sale, because the land was not sold in parcels, and because the mortgagee himself became the purchaser; but it did not allege that the complainant asked a sale in parcels, nor that there was any unfairness or irregularity in the sale; and the averments and exhibits both show that the price bid was more than the amount of the mortgage debt. Jones on Mortgages, §§ 1857-59; *Goldsmith v. Osborne*, 1 Edw. Ch. 562; *Rutherford v. Williams*, 42 Mo. 18; *Robinson v. Amateur Asso.*, 14 S. C. 148; *Elliott v. Wood*, 45 N. Y. 71; *Schwartz v. Sears*, Walker's Ch. (Mich.) 170; 5 John. Ch. 35; *Rogers v. Torbut*, 58 Ala. 523; *Eslava v. Crampton*, 61 Ala. 507; *Smith v. Conner*, 65 Ala. 371; 49 N. Y. 377.

STONE, J.—Garland executed a mortgage to Watson, with power of sale, the subject of the mortgage being lands. Watson sold under the power contained in his mortgage, after due advertisement, and himself became the purchaser. He thereupon, describing himself as mortgagee, conveyed the lands to himself as an individual. In less than twelve months afterwards, Garland filed this bill to disaffirm the sale.

It is too well settled by the decisions of this court to require further argument, that when a mortgagee of lands sells under the power contained in the mortgage, and becomes the purchaser at his own sale, he arms the mortgagor with the option, if expressed in a reasonable time, of affirming or disaffirming the sale, and this without any reference to the fairness of the sale, or the fullness of the price.—*James v. James*, 55 Ala. 525; *McLean v. Presley*, 56 Ala. 211; *McGehee v. Lehman*, 65 Ala. 316; *Dozier v. Mitchell*, *Ib.* 511; *Harris v. Miller*, 71 Ala. 26; *Bush v. Sherman*, 80 Ill. 160. The present bill was filed in time, and the record fails to show the mortgagor had done any thing to estop him from asserting his election to disaffirm the sale.

The object and prayer of the present bill are simply to disaffirm and set aside the sale. There is neither averment nor prayer which reaches beyond that single purpose. Nothing said as to the state of the account, or payments on the mortgage; no tender or offer to pay what may be due; no offer to redeem, or otherwise to do equity. A bill for such a purpose can not be maintained.—2 Jones on Mortgages, §§ 1052, 1077, 1093 to 1096, 1921; *Rogers v. Torbut*, 58 Ala. 523; *Grigg v. Banks*, 59 Ala. 311; *McGehee v. Lehman*, 65 Ala. 316; *Smith v. Conner*, 65 Ala. 371; *Dozier v. Mitchell*, *Ib.* 511; *Collins v. Riggs*, 14 Ala. 491; *Post v. Bank of Utica*, 7 Hill, (N. Y.)

[Allred v. Kennedy.]

391; *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Schwartz v. Sears*, Walker's Ch. (Mich.) 170.

There is a class of cases, in which a bill filed by a mortgagor, either to redeem, or to obtain other equitable relief, may result in ascertaining the true amount due on the mortgage; and if the sum thus ascertained to be due be not paid by a day named in the decree, there may be a sale of the land, for the payment of the sum decreed. Decrees have been rendered in this alternative form, and we will not inquire into their soundness. But, to maintain such bill, there must be an offer to do equity, by tender, or in some other equitable form, and the complainant, by his averments and offer, must submit himself to the jurisdiction of the court, so that proper decree can be rendered against him, without a cross-bill.—*Rogers v. Torbut*, 58 Ala. 523; *Andrews v. Hobson*, 23 Ala. 219; *Charles v. DuBose*, 29 Ala. 367; *McLean v. Presley*, 56 Ala. 211; *Downs v. Hopkins*, 65 Ala. 508; *Mooney v. Walter*, 69 Ala. 75. The present bill is not brought within this rule. The result is, the complainant has shown no title to relief.—1 Dan. Ch. Prac. 330.

We will so far modify the decree, as to make it a dismissal without prejudice.—*Taylor v. Robinson*, 69 Ala. 269. As amended, the decree of the chancellor must be affirmed.

Allred v. Kennedy.

Statutory Real Action in nature of Ejectment.

1. *Verbal admission as to title to land.*—In ejectment, or the statutory action in nature of ejectment, both parties claiming through mesne conveyances from the same person, one of the plaintiff's deeds having been lost or destroyed, and the secondary evidence being conflicting as to the form and sufficiency of its execution, plaintiff's verbal admission that he never had any title to the land, or any interest therein, is relevant and competent evidence for the defendant.

2. *Same.*—So, although the mere return of a deed by the grantee to the grantor would not effect a divestiture of the title, the plaintiff may be asked "if he did not return the land papers to said C.," his vendor; the fact of such return being relevant to the question, whether they were not worthless as a conveyance.

3. *Agreement as to testimony of absent witness.*—When there is an agreed statement as to the testimony of a witness supposed to be absent, but who comes into court during the trial, the statement should be suppressed, if duly objected to, and the witness examined orally; but the objection is waived, if not interposed until after the statement has been read to the jury.

[Allred v. Kennedy.]

4. *Contents of transcript.*—The bill of exceptions reserved on a former trial being no part of the transcript on a second appeal, no costs will be allowed for it.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. LEROY F. BOX.

GEO. H. PARKER, and HAMILL & DICKINSON, for appellant, cited Tyler on Ejectment, 72; *Kelly v. Hendrix*, 57 Ala. 193; 1 Greenl. Ev. §§ 203, 96, 109, 461, 434; *Life Ins. Co. v. Walker*, 58 Ala. 290; *M. & C. Railroad Co. v. Maples*, 63 Ala. 606; *Peterson v. The State*, 63 Ala. 114; *Humes v. O'Bryan & Washington*, at the present term.

SOMERVILLE, J.—The action is one of ejectment, under the statute, brought by the appellant, as plaintiff in the court below, against the appellees, Kennedy and others, as defendants. Both parties claimed to have derived title from one Joseph Knighton, and the whole contention resolved itself into one as to the relative superiority of the two claims of title put in evidence before the jury. The several errors assigned arise exclusively upon the rulings of the Circuit Court on the evidence.

The first assignment is based upon the fact, that the court permitted the defendant to prove a *verbal* admission by the plaintiff, that he had never had any title, or interest in the land sued for. In this we think there was no error. The deed from Knighton to Clayton, which was a part of the plaintiff's chain of title, was proved to have been *lost*, or *destroyed*, and was not produced on trial. The evidence was conflicting, as to whether this instrument was so executed as to convey the legal title—one witness testifying that it was neither attested by witnesses, nor acknowledged before any officer authorized to take acknowledgments of conveyances. Whether we regard this parol admission as one involving a material matter of *fact* and of *law*, so mingled as to be incapable of separation, or as having reference to the contents of a lost instrument, it is equally free from objection. In either aspect, it would be clearly admissible as evidence.—*Shorter v. Shepherd*, 33 Ala. 648; 1 Brick. Dig. p. 835, § 436; *Lewis v. Harris*, 31 Ala. 689; 1 Greenl. Ev. § 97. There are several other exceptions of the same character appearing in the record, which must be overruled as not well taken.

2. The question propounded to the plaintiff, on cross-examination—"Did you not turn the land papers back to Clayton?"—was not irrelevant. It was not permissible, it is true, to prove this fact in order to show a change of title from the plaintiff to Clayton, who was his alleged vendor; for no such effect

[Jackson v. Bain.]

would be produced by turning the papers back to the grantor, even if proved. But it was competent to corroborate the theory, that the deed was so defectively executed as to convey no title to plaintiff; for, if cognizant of this fact, the plaintiff would be more likely to return the papers as worthless.

3. There was no error in the action of the court touching the witness Shaver, or the agreed statement as to his testimony. If this witness had been in court, or near at hand, when it was proposed by plaintiff's counsel to read his statement, it would clearly have been the duty of the court to compel the plaintiff to introduce the witness, instead of his mere statement, which would have become, in such case, only secondary evidence. In other words, the statement should, in such event, have been suppressed. But it is not clear from the bill of exceptions that the motion to suppress was made in time, or that it was not made after the defendant's attorney had finished reading the writing to which objection was taken.

We see no error in the other exceptions, and the judgment must be affirmed.

PER CURIAM.—No costs will be allowed the clerk of the court below, for copying in this record the bill of exceptions used on a former appeal to this court.

Jackson v. Bain.

Statutory Trial of Right of Property to Cotton.

1. *Nature of statutory claim suit.*—A statutory claim suit, or trial of the right of property, is not an independent suit which may be inaugurated to determine the disputed title to property, but is consequential and dependent upon the levy of valid process against a third person.

2. *Burden of proof in such action.*—In such action, the plaintiff in the process is the actor, and the *onus* is on him to show the levy of valid process in his own favor, and to adduce *prima facie* evidence of the ownership of the property by the defendant in the process; and until he has done this, the claimant is not required to adduce any evidence.

3. *Landlord's lien on crop, and attachment to enforce it.*—A landlord's lien on the crop grown on rented lands, for rent and advances (Code, §§ 3467-72), is neither a *jus ad rem*, nor a *jus in re*; and until he has sued out a valid attachment, and had it levied on the crops, he can not recover in a statutory claim suit against a third person.

4. *Defects in process available to claimant.*—If the process levied on the property is void, the plaintiff can not recover in the statutory claim suit; and neither consent nor waiver, on the part of the defendant, can remedy the defect.

5. *Attachment issued by notary public.*—An attachment issued by a

[Jackson v. Bain.]

notary public, who is *ex officio* a justice of the peace, returnable to the Circuit Court, is void.

6. *Error without injury in rulings against plaintiff.*—When the record shows that the plaintiff never can recover, rulings against him by the court below, however erroneous, can not injure him, and are no ground of reversal.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. LEROY F. BOX.

This was a statutory trial of the right of property to a bale of cotton, and fifty bushels of cotton-seed, on which an attachment was levied in favor of James L. Jackson, and to which a claim was interposed, under the statute, by James S. Bain. Under the rulings of the court below, to which exceptions were duly reserved by the plaintiff, there was a verdict and judgment for the claimant; and these several rulings are now assigned as error.

ROBINSON & BROWN, for the appellant, contended that, although the plaintiff's attachment was void, under the authorities cited for the appellee, the defect was waived by the defendant's appearance without objection, and the claimant could not go behind the judgment.

HAMILL & LUSK, *contra*, cited *Vann & Waugh v. Adams*, 71 Ala. 475; *Nordlinger v. Gordon*, 72 Ala. 239.

STONE. J.—The present controversy originated in an attachment for rent, sued out by James L. Jackson, the appellant, through his agent, and against Thomas J. King. The attachment writ was levied on part of the crop grown on the rented land. This suit was not defended by King, and there was judgment against him by default. The record shows these proceedings, but there is no appeal from that judgment.

Soon after the attachment was levied, Bain, the appellee, interposed a claim to the property levied on. He filed his affidavit of ownership, and executed the necessary claim-bond, to institute the statutory action, known in our jurisprudence as a *trial of the right of property*. This is not an independent suit, which parties may inaugurate in the first instance. It is statutory, and consequential in its nature. It is consequential, or collateral to the main suit. It most frequently arises when personal goods are levied on under execution or attachment against one, which are claimed to be the property of another. The interposition of such claim, by affidavit and bond, suspends sale under the process, until the issue of ownership is determined. The issue is formed by an averment, by the plaintiff, that the property seized is the property of the defendant in

[Jackson v. Bain.]

execution or attachment, and subject thereto; and a denial thereof by the claimant. The burden of proof in this issue is on the plaintiff in execution or attachment.—Code of 1876, § 3343. He must first offer proof of prior possession, or other evidence of ownership in defendant, before the claimant need offer any evidence of his title. Till the *onus* is shifted by such proof, the claimant may rest on plaintiff's failure to sustain his asserted right.

When, however, the plaintiff has shown a *prima facie* right of recovery, by showing prior possession in defendant, or other proof of liability, then the burden of proof shifts, and the claimant must establish his right to the property. He can not show that the right and title is in a third person, unless he shows that he has acquired that third person's right.—2 Brick. Digest, 480, § 67; *Elliott v. Stocks*, 67 Ala. 290. But still, as stated in this last case, the *onus* is on the plaintiff in the first instance.

The attachment, by which the present proceedings were inaugurated, was issued by a notary public, and made returnable to the Circuit Court. That attachment was and is void on its face.—*Vann & Waugh v. Adams*, 71 Ala. 475. The present suit, as we have shown, grew out of that attachment and its levy, and without them it can not stand. True, the landlord has a lien on the crop grown for rent and advances; but it is not a *jus ad rem*, nor a *jus in re*. Till attachment is levied, there can be no valid trial of the right to it, in the present form of proceeding. Till such levy, the conditions are not presented which authorize such trial. The action being statutory and exceptional, the statutory requisites must precede its institution; and neither consent nor waiver can dispense with this fundamental condition precedent: it is jurisdictional. The attachment in this case being void, it has no greater validity than if no attempt had been made to issue it. The claimant can take advantage of it, because it is void—not merely irregular. 2 Brick. Dig. 480, § 72. He can take advantage of it, because it is the first and fundamental evidence of plaintiff's right, without which he can not recover. Being void, the first step can not be taken, in showing a *prima facie* right of recovery. He falls before he reaches the adversary's outworks.—*Flash v. Parull*, 29 Ala. 141.

We need not consider the several rulings of the Circuit Court. Possibly, the correct practice would have been to rule out the attachment and levy, as worthless and immaterial. It matters not, however, what the special rulings of the Circuit Court may have been. The plaintiff never can recover; and hence, even if erroneous rulings were committed in submitting ques-

[Barber v. Williams.]

tions to the jury which the court should have decided, they did the appellant no harm.—1 Brick. Dig. 780, § 96.

Affirmed.

Barber v. Williams.

Statutory Real Action in nature of Ejectment.

1. *Alienation by widow, before dower assigned.*—Until dower is assigned to the widow, she has the right to retain, free from the payment of rent, possession of the dwelling-house in which her husband most usually resided next before his death (Code, § 2238); but she has no specific estate or interest which she can assign to another, and the heir may recover against her alienee, although he could not disturb her possession before an assignment of dower.

2. *Widow's right of homestead exemption; alienation of homestead.* The widow's right of homestead exemption, under the provisions of the constitution of 1868, is the right to remain in the occupancy of the homestead of her deceased husband during her life; and this right she may abandon, and does abandon, as against the heir, by an alienation to another person.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JNO. P. HUBBARD.

This action was brought by Jeannetta Williams, an infant, suing by her next friend, against Robert Barber and his wife, to recover the possession of a city lot in Montgomery, particularly described in the complaint, with damages for its detention; and was commenced on the 3d May, 1882. The defendants pleaded not guilty, accompanied with a suggestion of adverse possession and the erection of valuable improvements; and the cause was tried on issue joined on these pleas. The plaintiff claimed the premises as the sole child and heir at law of John M. Williams, deceased; and she proved on the trial, as the bill of exceptions shows, the death of her father in 1869, his possession and ownership of the premises as his residence, and her birth a few months after his death, while her mother, the widow, was still in the occupation of the premises. The defendants claimed as sub-purchasers from Mrs. Laura A. Williams, the widow, who, on the 12th April, 1876, sold and conveyed, by quit-claim deed, to W. S. LaGrone, who afterwards sold and conveyed to Mrs. Barber. The bill of exceptions states, that "the evidence adduced on the trial tended to show that, at the death of said John M. Williams, the lot, with the improvements thereon, was not worth more than \$600 to \$800;

[Barber v. Williams.]

that said Williams left a small personal property, consisting of household and kitchen furniture worth not more than \$100 to \$200, and owed no debts; that no dower or homestead was ever assigned to his widow by metes and bounds, and she never applied to any court therefor; that she and her child (the plaintiff) lived on the premises for some time after the death of her said husband, but she had rented them out at the time of the sale and conveyance to said LaGrone, and was not then in possession thereof; and that the said Laura A. Williams, the widow, is still living, and the plaintiff is living with her." On this evidence, the defendants requested the court, in writing, to charge the jury as follows: "If the jury find, from the evidence, that the property sued for was the homestead and residence of said John M. Williams at the time of his death, and was not worth more than \$1,000, and consisted of a house and lot of the dimensions described in the complaint; and that he left a widow surviving him, likewise in possession at his death; then the widow had a right to hold the whole, by virtue of her homestead and dower right, without any assignment by metes and bounds; and her conveyance, she being in possession claiming it, conveyed to her purchaser the right to hold the said premises during her life; and if the widow is still alive, the plaintiff, as the alleged heir of said John M. Williams, can not now recover the said premises from said purchaser." The court refused to give this charge, and the defendants excepted to its refusal; and its refusal is now assigned as error.

WATTS & SON, and RICE & WILEY, for appellants.—As there were no debts, there was no necessity for administration on the estate of J. M. Williams; and as the value of the homestead was less than the law allowed to the widow, proceedings for an allotment would have been a useless ceremony and expense. *Thompson on Homestead*, §§ 652-3, 833; *Beecher v. Baldy*, 7 Mich. 488; *Thomas v. Dodge*, 8 Mich. 50; *Simpson v. Simpson*, 30 Ala. 225; *Gamble v. Reynolds*, 42 Ala. 236.

SAYRE & GRAVES, *contra*.—When there are no debts, there is no necessity for an administration; but the rights of the heir at once attach, and can not be defeated by any act on the part of the widow. The widow was entitled to remain in the possession of the property until her dower was assigned, notwithstanding the infancy of the heir, and she was entitled to retain possession as a homestead; but she had no estate which she could alien as dower, and her alienation was an abandonment of the homestead.—*Wallace v. Hall*, 19 Ala. 367; *Miller v. Marx*, 55 Ala. 341.

[Barber v. Williams.]

BRICKELL, C. J.—1. Until dower is assigned, the statute secures to the widow the right to retain, free from the payment of rent, possession of “the dwelling-house where her husband most usually resided next before his death.”—Code of 1876, § 2238. The right may continue for an indefinite period, and during its continuance she can take the rents and profits, appropriating them to her own use. But, until dower is assigned, she has no specific interest or estate in the lands: the right to dower is in its nature rather a right of action, and it is not assignable otherwise than by a release to the heir or terre-tenant, which operates by way of extinguishment, and not by way of conveyance.—*Weaver v. Crenshaw*, 6 Ala. 873; *Shelton v. Carroll*, 16 Ala. 148; *Cook v. Webb*, 18 Ala. 810; *Wallace v. Hall*, 19 Ala. 367; *Saltmarsh v. Smith*, 32 Ala. 404. Immediately on the death of the ancestor, lands not devised descend to the heir at law, who is entitled to possession, unless the descent is intercepted by the act of the personal representative, in the exercise of the authority over real estate which the statutes confer. While the widow retains possession of the dwelling-house, she can not be ousted by the heir; for it is his duty to cause dower to be assigned her, and until the assignment her statutory right of possession continues.—*Shelton v. Carroll*, *supra*. But, as she has not a fixed, determinate interest, or an estate in the lands, and as her alienation to a stranger, before dower is assigned, passes no estate or interest, the heir can successfully maintain ejectment, or the corresponding statutory action, against the alienee, or one entering under him, for the recovery of possession.—*Wallace v. Hall*, *supra*.

2. There can be no doubt that, at and prior to the death of the ancestor, his occupancy had impressed the character of homestead upon the premises in controversy. The only law of force at his death, which conferred upon the widow surviving the right to remain in the occupancy of the premises as a homestead, was the constitution of 1868. There was no statute then in existence, declaratory of, or defining or enlarging the right. The construction of the constitution is, that it confers upon the widow the right to remain in the occupancy of the homestead of her deceased husband during her life,—a right it is contemplated will be enjoyed in common with the minor children of the marriage, during their minority; and that the right may be enjoyed, the homestead is exempt from administration, and from descent or devise, during her life. If there be no widow, a like right is secured to the children, during their minority. *Miller v. Marx*, 55 Ala. 322. As is said in this case, the right of the widow, or of the minor children, is that of occupancy—it does not include a right to convey or incumber the homestead. Occupancy as a home, as a dwelling-place, is the fact which im-

[Pollard v. Hanrick.]

presses upon land the character of a homestead, drawing it within the influence of constitutional or statutory provisions, exempting it from liability for the payment of debts, or from subjection to administration, or intercepting the descent to the heir.—*McConaughy v. Baxter*, 55 Ala. 379; *Boyle v. Shulman*, 59 Ala. 566. If the ancestor, while in life, had abandoned the occupation of the premises as a dwelling-place, acquiring a homestead elsewhere, from them the exemption allowed by the constitution would have been withdrawn, and would have been extended to the new dwelling-place he acquired. The widow, not resting under disability, may, after the death of the husband, abandon the homestead, and acquire a new homestead elsewhere, precisely as he could have done while living.—*Wright v. Dunning*, 46 Ill. 275. How far her abandonment would affect the rights of the minor children, is not now the matter of consideration. The abandonment works a destruction of her privileges; and as she has no power of alienation, if she does alien it, like the alienation of her right of dower before assignment, the descent to the heir is not thereby interrupted, and he may maintain ejectment against her alienee, or those entering under him.

The instruction requested was properly refused; and as its refusal forms the only matter of the assignment of errors, the judgment must be affirmed.

Pollard v. Hanrick.

Statutory Real Action in nature of Ejectment.

1. *Sale of decedent's lands, for distribution; conclusiveness of order on collateral attack, and presumptions in favor of.*—When a sale of lands by an administrator under a probate decree, for distribution, is collaterally attacked,—as where the heirs bring ejectment against a person claiming under the sale,—mere irregularities in the proceedings, which would be available on demurrer, or on error or appeal, will not avoid the sale; and a liberal construction will be placed upon the language used, in order to sustain the jurisdiction of the court.

2. *Same; sufficiency of petition.*—An allegation in the petition that the lands “can not be equally, equitably divided” without a sale, being liberally construed, is the equivalent of an allegation that they can not be “equitably divided” without a sale (Code, § 2449), and is sufficient to sustain the jurisdiction of the court to grant the order.

3. *Same; execution of conveyance to purchaser.*—In reference to such sales, the theory of the law is, that the court itself is the vendor, and the person authorized to execute a deed to the purchaser is merely its agent, or instrument; and if the administrator dies without having executed a

[Pollard v. Hanrick.]

conveyance as ordered, after the purchase-money has been paid and the sale confirmed, the court may appoint and authorize another person to execute a conveyance.

4. *Title acquired by defendant after commencement of suit.*—Since the plaintiff in ejectment, or the statutory action in the nature of ejectment, must show title in himself at the commencement of the suit, and also at the time of the trial; the defendant may defeat a recovery, under a plea *puis darrein continuance*, by showing title in himself acquired or perfected after the commencement of the suit.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JNO. P. HUBBARD.

This action was brought by Mary Pollard and others, against John M. Hanrick and others, to recover a tract of land particularly described in the complaint, with damages for its detention; and was commenced on the 24th May, 1881. The plaintiffs claimed as the heirs at law of Amanda R. Earnest, deceased, who was seized and possessed of the land at the time of her death, the date of which is not shown by the record; while the defendants claimed the portions of which they were respectively in possession, and for which only each one defended, under conveyances from John Gamble, who purchased at a sale made by R. R. Wright, as the administrator of the estate of said Amanda R. Earnest, under an order and decree of the Probate Court of said county. The order of sale was granted on the 9th December, 1867, and was founded on a petition filed by said administrator, under oath, which contained the following (with other) allegations: "Your petitioner further represents, that said estate owes some debts that are now due and unpaid,—for instance, her medical bill, and funeral expenses; also, that after said debts are paid, said lands can not be equally, equitably divided among the heirs, without a sale thereof." The order recites that the petition is "for an order to sell the lands of said estate for the purpose of division, and upon the ground that the same can not be equitably divided among the heirs of said estate;" and it is in all respects regular on its face. The sale was made by the administrator, pursuant to the terms of the decree; Gamble becoming the purchaser, at the price of \$480, one half of which sum was paid in cash. The sale was reported by the administrator to the court, and was by it confirmed on the 8th March, 1870; and on the 12th May, 1871, the administrator having reported the payment of the purchase-money in full, the court made an order directing him to execute a conveyance of the lands to said Gamble as the purchaser. The administrator afterwards made a final settlement of his administration, and accounted for the purchase-money of the land; and he subsequently died without having executed a conveyance to said Gamble. On the 1st November, 1881, after the commencement of this suit, said

[Pollard v. Hanrick.]

John M. Hanrick and Rebecca Wright, two of the defendants, filed their petition in the Probate Court, alleging the facts above stated, and their respective purchases from Gamble, and asking that a suitable person might be appointed by the court to execute a conveyance to each of them. On the hearing of this petition, as the decree recites, the heirs and distributees of the estate being present by attorney, "and E. Crenshaw, administrator *ad litem* of said Amanda R. Earnest," and the averments of the petition being "established to the satisfaction of the court by legal and competent evidence," the court appointed Edward Crenshaw as a suitable person, and authorized and directed him to execute conveyances to said petitioners as prayed. Said Crenshaw, as commissioner, afterwards executed conveyances in accordance with the decree; and these conveyances were offered in evidence by the defendants, under a plea *puis darrein continuance*.

The plaintiffs raised various objections, both on the pleadings and evidence, to the sufficiency and validity of these proceedings, all of which were overruled by the court; and the court charged the jury, on the request of the defendants, "that they must find for the defendants, on their plea since the last continuance, if they believed the evidence." The plaintiffs excepted to this charge, and they now assign it as error, with the adverse rulings on the pleadings, and the several rulings on evidence to which exceptions were reserved.

J. C. RICHARDSON, and J. M. WHITEHEAD, for appellant.

JOHN GAMBLE, *contra*. (No briefs on file.)

SOMERVILLE, J.—The action is one of ejectment under the statute, brought by the plaintiffs claiming as the heirs of Amanda R. Earnest. The defendants claim title under one Gamble, who purchased the lands in controversy at an administrator's sale, under an order of the Probate Court made for distribution.

It is insisted, in the first place, that the order of sale made by the Probate Court was void for want of jurisdiction, because the petition filed by the administrator was fatally defective in its allegations. The statute provides, that a sale of lands for distribution may be made when such lands "can not be *equitably* divided among the heirs or devisees."—Code, 1876, § 2449. The averment of the administrator's petition, which was filed in October, 1867, was, that the lands could not be "*equally, equitably* divided" among the heirs without a sale.

The governing principle is, that when the validity of such a sale is collaterally attacked, as is attempted in this case, it can

[Pollard v. Hanrick.]

not be avoided for mere irregularities, which might prove fatal on direct attack, as grounds of successful demurrer, or of reversible error in the appellate court. The jurisdiction of the court ordering the sale will be sustained, if the application or petition contains substantially the necessary allegations prescribed by statute. Nor is it required that the precise words or language indicated by the statute should be used. It is sufficient, if words of equivalent import or meaning are used. These principles have been often declared, and are well settled.—*Bland v. Bowie*, 53 Ala. 152; *King v. Kent*, 29 Ala. 542; *Wilburn & Co. v. McCalley*, 63 Ala. 436.

2. It is an important rule of construction, in all such cases, that, on collateral attack of proceedings of this nature, every reasonable intendment will be made in favor of the validity of titles acquired under them. The language of the petition will be construed liberally for the maintenance of the decree, and no hyper-critical construction will be indulged favorable to its overthrow.—*Bibb v. Bishop Cobbs' Orphans Home*, 61 Ala. 326; *King v. Kent*, 29 Ala. 553; *Wright's Heirs v. Ware*, 50 Ala. 549.

Under these rules of construction, the averment of the petition in question is, in our opinion, sufficient. The plain and common-sense meaning of the phrase used is not to be destroyed by the mere awkwardness of a redundant expression. *Equality* is often said to be *equity*. *Equally* and *equitably* were evidently used by the pleader as verbal synonyms, and were so understood by the primary court. A liberal construction will very clearly uphold the language of the petition, as being of equivalent import with that prescribed by the statute. *Satcher v. Satcher*, 41 Ala. 26; *Warnock v. Thomas*, 48 Ala. 463.

3. The Probate Court was fully invested with the authority to appoint another person than the administrator, to execute a conveyance of the land to the purchaser, Gamble. The sale had been reported to the court as regularly made under a valid decree, and the purchase-money was shown to have been fully paid. The court had confirmed the sale, and ordered the administrator to make the conveyance. The *death* of the administrator, after the making of this order, was a contingency which, in our opinion, would justify the subsequent order appointing and authorizing Crenshaw to carry out the order by making the conveyance. The statute provides, as now amended by the act of March 1, 1881, that "after such confirmation, and when the whole of the purchase-money has been paid by the purchaser, or any person holding under him, on the application of such person, *or such person holding under him*, or that of the executor or administrator, the court must order a conveyance to be made to such purchaser by such executor or

[Adams v. Munter & Brother.]

administrator, or such other person as the court may appoint, conveying all right, title and interest, which the deceased had in such lands at the time of his death; and such order shall operate to vest the title of the decedent in such purchaser." Session Acts 1880-81, p. 29; Code, 1876, § 2468.

The theory of the law is, that the court, and not the administrator, is the true and real vendor; and the person authorized to convey, whether the administrator, or some other suitable person, is the mere agent, or instrument of the court, carrying out its instructions under the powers conferred by the statute.

It is no valid objection, that the title of the defendants was perfected after the commencement of the present suit. The rule in ejectment is, that the plaintiff is not entitled to recover, unless he can show title both at the commencement of the action, and at the time of trial, or judgment rendered. If his title be destroyed, or terminate, between the commencement of suit and the day of trial, he can not recover.—*Scranton v. Ballard*, 64 Ala. 402. When the order of the Probate Court was executed, authorizing Crenshaw to convey the lands to Gamble, the title of the heirs was divested; and this was necessarily fatal to the successful maintenance of their suit, when set up by plea *puis darrein continuance*, which was the proper method of raising the issue.—*Feagin v. Pearson*, 42 Ala. 332.

There is no error in the rulings of the Circuit Court, and the judgment is affirmed.

Adams v. Munter & Brother.

Creditor's Bill in Equity to set aside Judgment as Fraudulent.

1. *Issues out of chancery; when ordered.*—Under the statutory provisions relating to issues out of chancery, and declaring that the court "must direct an issue to be made up whenever it is necessary for any fact to be tried by a jury" (Code, § 3890), although there may be cases in which, the evidence being plain and clear, it might be a reversible error for the chancellor to order the issue to be submitted to a jury, the question must necessarily be submitted to his discretion, when the evidence is indeterminate, or conflicting; and where the record shows that "the plaintiff's right of recovery depended largely on inferences to be drawn from suspicious circumstances, against positive testimony to the contrary," this court can not say that he erred in submitting the question of fact to a jury.

2. *Same; objections to verdict, and decree non obstante.*—When the finding of the jury is based on illegal or insufficient evidence, or on improper rulings by the presiding judge, the chancellor may disregard it;

[Adams v. Munter & Brother.]

and he may award a *venire de novo*, with more specific instructions, if he chooses to give them; but, when no certified exceptions are brought before him, and the record does not show what evidence was adduced on the trial before the jury, this court can not declare that the complainant was entitled to a decree *non obstante veredicto*, because the finding of the jury is not sustained by the depositions on file in the cause.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JNO. A. FOSTER.

The bill in this case was filed on the 2d July, 1879, by J. R. Adams, as a simple-contract creditor of Munter & Brother, a mercantile partnership doing business in the city of Montgomery, against the said Munter & Brother, individually and as partners, and against J. Abraham & Brother, another mercantile firm in Montgomery; and sought to set aside, on the ground of fraud, a judgment which Munter & Brother had confessed in favor of said Abraham & Brother, and to condemn in the hands of Abraham & Brother moneys which they had collected under execution on said judgment. The judgment in favor of Abraham & Brother was for \$1,581, and was confessed on the 19th December, 1878. The complainant's debt was for a balance due on account of money loaned, for which he had held the note of Munter & Brother, indorsed by Abraham & Brother; which note he surrendered to Munter, on the 2d December, 1878, and took his check on the Planters' and Merchants' Bank for \$600, payment of which was refused on the ground that the drawer had no funds. The bill alleged that Munter & Brother were at that time insolvent, and were known to be so by said Abraham & Brother; and that the judgment in favor of the latter was without consideration in fact, and was confessed with the intention and purpose, on the part of both Munter & Brother and Abraham & Brother, of defrauding the creditors of the former, and particularly the complainant. An answer was filed by J. Abraham, denying the charges of fraud, and insisting on the validity of his judgment; and on his death pending the suit, the cause was revived against his administrator. An answer was also filed by Munter & Brother, denying the charges and allegations of fraud, but admitting their insolvency at the time the judgment was confessed.

The cause being submitted for decree, on the pleadings and proof, and on exceptions to the testimony, as noted by the register, the chancellor rendered an interlocutory decree, as follows: "On consideration, it appearing to the court that this cause depends very largely, if not entirely, upon a question of fact, which should be tried by a jury, it is ordered that an issue of fact be made up between the complainants (?), to be tried by a jury; and that the trial of such issue be sent to the Circuit

[Adams v. Munter & Brother.]

Court of Montgomery county for determination, or verdict by a jury, under the direction and instruction of said Circuit Court; upon the trial of which issue, the said court will submit to the jury like evidence as in a suit at law, and such parts (or the whole) of the pleadings and proceedings in this cause, and the depositions of the witnesses on file, as may be pertinent to the said issue and legally admissible; and the admission of such depositions shall not prevent the attendance and examination in person of the said witnesses, or of the said parties to this suit or any of them. . . . And it is further ordered that the issue, so to be submitted and tried under the direction and instruction of said Circuit Court, shall be as follows: Was the debt upon which said Munter & Brother confessed judgment in the Circuit Court of Montgomery, as described in the pleadings, a simulated debt, or was it a *bona fide* subsisting indebtedness at the time the confession of judgment was made."

The proceedings had on the trial in the Circuit Court are not set out in the record, and are only referred to in the final decree, which is in these words: "This cause was submitted for decree on the pleadings and proof, as shown by the note of the testimony, at the April term, 1881, when an order was made sending an issue of fact to be tried by a jury in the Circuit Court; and now the cause comes on further to be heard upon such submission, the verdict and proceedings in said Circuit Court having been certified to this court, and made a part of the proceedings in this cause. And on further consideration, it appearing from the said verdict of the jury that the debt upon which said judgment was confessed was not simulated, but was a *bona fide* subsisting one, and thereupon it appearing to the court that such confession of judgment was not fraudulent and void; it is ordered, adjudged and decreed, that the bill of complaint in this cause be, and the same is hereby, dismissed out of this court."

The interlocutory order submitting the issue of fact to a jury, and the final decree dismissing the bill, are now assigned as error.

GUNTER & BLAKEY, for the appellant.—The chancellor ought not to have submitted the decision of the case to a jury, but should himself have determined the law applicable to the facts proved, and pronounced the conclusion which the law draws from the undisputed facts. The case was prepared for final hearing, and was submitted for decree on the pleadings and proof. The chancellor was the court appointed by law to decide the case, and the evidence was all before him. A stronger case of fraud was never made out, and he had but to apply legal principles and presumptions to the undisputed facts. As

[Adams v. Munter & Brother.]

to the facts on which the complainant relied as establishing fraud, there was no conflict in the evidence; and the legal principles applicable to these facts were well established. *Hubbard v. Allen*, 59 Ala. 283; *Harrell v. Mitchell*, 61 Ala. 270; *Hamilton v. Blackwell*, 60 Ala. 545; Bump on Fraud. Conv. 50-51; *Lincoln v. Claflin*, 7 Wall. 132; *Borland v. Mayo*, 8 Ala. 112. There being no conflict in the evidence as to the facts showing fraud, it was the duty of the chancellor to draw the necessary conclusion, instead of remitting the complainant to the uncertain verdict of a jury. From his decision, if adverse, the complainant would have had a right of appeal to this court; and the reference to the jury, in effect, deprived him of this right, since the decree is founded on the verdict. The submission of the issue to the jury has the further effect of enlarging the note of the testimony on which the cause was submitted, and thereby giving an undue advantage to a party whose conscience is elastic. It is submitted that the chancellor should himself have decided the issue presented, and should have rendered a decree for the complainant *non obstante veredicto*.—*Whalley v. Whalley*, 3 Bligh, P. C. 16; *Bovitt v. Hitchcock*, 3 Law Rep., Chan. Ap. 419; 2 Dan. Ch. Pr. 1072, and notes, 4th ed.; *Atwood v. Smith*, 11 Ala. 911; *Kennedy v. Kennedy*, 2 Ala. 625; *Pryor v. Adams*, 1 Amer. Dec., 533, and note.

SAYRE & GRAVES, *contra*.—An issue of fact for the decision of a jury is only intended to satisfy the mind and conscience of the chancellor, and is not conclusive on him; nor is the verdict conclusive on the parties, when properly presented for revision.—*Anon.*, 35 Ala. 229, and cases cited; 2 Dan. Ch. Pr. 1120. The question of fraud *vel non*, as presented by the pleadings, was eminently proper for the decision of a jury; and the record presents no *data* for reviewing their verdict.

STONE, J.—Section 3890 of the Code of 1876 provides, that “whenever it is necessary for any fact to be tried by a jury, the court must direct an issue to be made up, setting forth clearly the true fact to be tried; and such issue must be tried before the chancellor, or may be sent to the Circuit Court in the district for trial,” &c. Section 3891 is in these words: “Such issue must be tried upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order.”

These sections relate to issues out of chancery. They declare by statute what had long been known as a well recognized rule in chancery proceedings. The principle on which it rests is, that in doubtful or controverted questions of fact, requiring

[Adams v. Munter & Brother.]

inferences to be drawn from indeterminate premises, or where the testimony is in irreconcilable conflict, the mind of the chancellor is left in doubt. The verdict of a jury, in such case, instructs the conscience of the chancellor, and enables him to arrive at a more satisfactory conclusion.—1 Brick. Dig. 735, § 1421. We will not say there may not be cases, many cases, where the testimony is so plain and clear, that it would be a reversible error for the chancellor to order an issue to be tried by a jury. In such cases, it would not “be *necessary* for any fact to be tried by a jury,” and the case would not fall either within the rule or the statute. The expense and delay consequent on such reference forbid that it should be resorted to unnecessarily. Few cases come before us, in which this practice has been resorted to, and we feel safe in affirming that the chancellors exercise this function of the court sparingly. When there is an issue of *devisavit vel non*, a trial by jury may be demanded, as matter of right.—1 Brick. Dig. 735, § 1422.

When the testimony is indeterminate, or conflicting, who is to determine when it becomes “necessary for any fact to be tried by a jury?” It would seem, on principle, that this question must necessarily be submitted to the discretion of the chancellor. He is charged with the ascertainment of the facts, and he, of necessity, must determine the inquiry, whether his judgment and conscience are so clearly convinced, that he does not need the finding of a jury. The exercise of such discretionary power by the chancellor, can not be the subject of review in an appellate court.—*Anonymous*, 35 Ala. 226; *Dale v. Roosevelt*, 6 Johns. Ch. 255; *Tappan v. Evans*, 11 N. H. 311; *Bassett v. Johnson*, 2 Gr. Ch. 417; *Black v. Shreve*, 13 N. J. Eq. 454, 478; 2 Dan. Ch. Pr. 1110, n. 3. Applying this principle to this case, we feel bound to affirm that the complainant’s right of recovery depended largely on inferences to be drawn from circumstances of suspicion, against positive testimony to the contrary. We can not say this case falls without the chancellor’s discretionary power, to order the disputed question of fact to be tried by a jury.

2. It is contended, in the next place, that the chancellor should have decreed for complainant, *veredicto non obstante*. This contention is based alone on the depositions found in the record. But how can we know, or presume, that the issue before the jury was tried on that evidence alone? The statute directs that “such issue must be tried upon the like evidence as a snit at law,” together with the proof furnished by the chancery file, as the chancellor may order. How, in the state of this record, are we to know what oral evidence was or was not given before the jury? In the absence of record proof to the contrary, we must presume that all was rightfully and law-

[Toon v. Finney.]

fully done in the court below. If the appellant was dissatisfied with the conduct of the trial of the issue in the Circuit Court, he should have had the particulars wherein he supposed himself injured by the rulings on that trial, certified by the presiding judge, and thus made that certificate, or the certified exceptions, the basis of a motion for relief before the chancellor. The chancellor had power to award a *venire de novo*, with more specific directions, if he chose to give them; or to disregard the finding of the jury, as based on illegal or insufficient testimony, or improper rulings by the presiding judge.—*Alexander v. Alexander*, 5 Ala. 517. In *Fitzhugh v. Fitzhugh*, 11 Gratt. 210, the principle is declared, that “upon an issue directed out of chancery, the verdict of the jury is conclusive, where there is no exception spreading the facts proved upon the record.” The same principle is declared in *Dodge v. Griswold*, 12 N. H. 573. See, also, *Lansing v. Russell*, 13 Barb. 510.

There is nothing in the present record to show any improper ruling in the Circuit Court; nothing to show what additional testimony was before the jury, and no motion for a new trial was made in the court below. We feel bound to presume the verdict was sustained by sufficient evidence.

The decree of the chancellor is affirmed.

Toon v. Finney.

Bill in Equity to set aside Award.

1. *Presumption in favor of decree.*—Where a decree is rendered on pleadings and proof, and the testimony is not set out in record, this court will presume that the decree was sustained by the proof.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

JONES & COULSON, for appellant.

ROBINSON & BROWN, *contra*.

SOMERVILLE, J.—The present case seems to have been submitted to the chancellor, and decided by him, upon the *pleadings and proof*, the proof consisting of a very large number of depositions. These depositions have all been omitted from the record, and in their absence we are bound to presume

[Simpson v. Williams.]

in favor of the correctness of the chancellor's decree dismissing the bill. The presumption is, that the allegations of the appellant's bill were not sustained by the proof; and the decree is accordingly affirmed.

Simpson v. Williams.

Bill in Equity for Specific Performance of Contract.

1. *Construction of title-bond.*—Under a stipulation in a bond for title, by which the vendor agrees, if the purchaser “should die *before the last payment is made*, and his wife is not able to pay the land out, to allot to her, by disinterested parties, the value of whatever amount has been paid on said land according to the within agreement,” the right of the purchaser's widow to an allotment of the land *pro tanto* is dependent upon his death without having made the last payment, and is not restricted to the contingency of his death before the day appointed for the last payment and its non-payment on or before that day.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. THOMAS COBBS.

The bill in this case, in the nature of a bill for the specific performance of a contract, was filed on the 26th February, 1883, by Susan E. Williams, the widow of William S. Williams, deceased, against Stephen Simpson; and sought to compel an allotment to her of a portion of a tract of land, which her husband had bought from said Simpson, according to a stipulation contained in the bond for title. The contract of sale was made in July, 1874. The tract of land contained 160 acres; and the agreed price was \$2,100, payable in three equal annual installments, on the 25th December, 1874, 1875, and 1876, respectively, for which the purchaser executed his three promissory notes. The bond for title, which was made an exhibit to the bill, recited the terms of the contract as to the payment of the purchase-money, and then proceeded thus: “Now, if the said notes are paid in full, I bind myself, my heirs and assigns, to make a *bona-fide* title to the above described lands to the said William S. Williams, or his legal representative. I further agree, if the said Wm. S. Williams should die before the last payment is made, and his wife is not able to pay the land out, to allot to her, by disinterested parties, the value of whatever amount has been paid on said land, according to the within sale of land. Witness my hand,” &c. The purchaser was put in possession of the land under this contract, and died in posses-

[Simpson v. Williams.]

sion in July, 1881, having paid the two notes first falling due, but leaving the last unpaid. The complainant alleged in her bill that her husband died intestate, leaving no estate, and owing no debts; that she was unable to complete the payment of the purchase-money for the land, and had notified the defendant of her inability to do so, and claimed an allotment of the land, *pro tanto*, according to the stipulations of the bond; and that he refused to make any allotment, and denied that she had any right or claim to the land under the contract.

The defendant demurred to the bill for want of equity, specially assigning as grounds of demurrer—1st, that the purchaser died, according to the allegations of the bill, long after the last note had become due, and had forfeited his right to enforce the contract; 2d, that no breach of the title-bond was shown; 3d, that the complainant showed no right to enforce the contract. The chancellor overruled the demurrer on these several grounds, and his decree is now assigned as error.

D. P. LEWIS, for appellant.—The right to enforce an allotment of the land, according to the stipulations of the title-bond, was made dependent on the purchaser's death not having paid the last note at maturity, and the widow's inability to pay it. The bill shows that the purchaser lived four or five years after the last note became due and payable, and never made or tendered payment of it, thereby forfeiting any right to enforce the contract. It shows, also, that the widow was able to complete the payments, if she desired to do so; since she alleges that her husband left no debts, and shows that he had a two-thirds interest in the land, having paid two of the notes.

W. P. CHITWOOD, *contra*, cited *Carver v. Eads*, 65 Ala. 190; 1 Brick. Digest, 695, §§ 811-2; *Ib.* 386, § 162.

SOMERVILLE, J.—The decree of the chancellor overruling the demurrer to the complainant's bill, which is for specific performance, is, in our judgment, entirely free from error. The last clause of the bond for title, which is the only matter of contention, was correctly construed by the court. The obvious purpose of its insertion was for the benefit of the vendee, whose aim was to secure so much of the land as he paid for, *pro tanto*, for the benefit of his wife, in the event of his dying before paying all of the purchase-money contracted to be paid by him. The language of the clause is: "I further agree, if the said Wm. S. Williams should *die before the last payment is made*, and his wife is not able to pay the land out, *to allot to her*, by disinterested parties, *the value of whatever amount has been paid on said land* according to the within agreement." To

[Wing v. Roswald.]

our apprehension, this language presents no ambiguity. It is not susceptible of the construction contended for, that no allotment *pro tanto* was to be made to the surviving wife, unless the husband died before the last payment was *agreed* to be paid. This would defeat the obvious intent of the parties, and be repugnant at the same time to the letter of the contract.

The decree is affirmed.

Wing v. Roswald.

Creditor's Bill in Equity to set aside Fraudulent Conveyance.

1. *Wife's earnings.*—The earnings of the wife belong to the husband, but he may repudiate his right to them, and allow the wife to retain them as her own; and when he does so, not being in debt, his subsequent creditors can not reach and subject them to the satisfaction of their debts.

2. *Rents and profits of wife's statutory estate.*—If the husband receives the rents and profits of lands belonging to his wife's statutory estate, and uses or converts them to his own use, he is under no obligation to account to the wife for them, and a re-payment to her would be fraudulent and void as against his existing creditors; but he may refuse to receive such rents and profits, and may allow the wife to invest them in property in her own name; whereby they would become a part of the *corpus* of her statutory estate, and the property could not be subjected to the husband's debts.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed on the 29th September, 1881, by Mrs. A. Roswald, suing as a judgment creditor of J. R. Wing, against the said Wing and his wife, together with J. J. Forniss and his wife; and sought to subject to the satisfaction of the complainant's said judgment a house and lot in the city of Montgomery, known as "No. 26 Market street," which the said Forniss and wife had conveyed to Mrs. Wing, taking a mortgage to secure the balance (\$500) of purchase-money unpaid. The complainant was a married woman, whose disabilities arising from coverture had been removed by a decree of the Chancery Court, and she was engaged in carrying on a store in Montgomery in her own name. Her judgment against Wing, which was for \$603.50, was rendered on the 12th October, 1880, and was founded on an account for goods sold and delivered; and an execution on said judgment was duly issued, and returned "No property found," before the bill was filed. The sale and conveyance of the house and lot by Forniss and

[Wing v. Roswald.]

wife to Mrs. Wing was made on the 16th March, 1881, at the agreed price of \$3,500, of which sum \$3,000 was paid in cash, and a mortgage taken to secure the payment of the residue. The bill alleged that the said purchase-money was really paid by said J. R. Wing, and the title taken in the name of his wife, "for the purpose and with the intent to hinder, delay and defraud complainant, as his judgment creditor, in the collection of her said judgment." The prayer of the bill was, that the deed to Mrs. Wing be declared fraudulent, and that the property be subjected to the satisfaction of the complainant's judgment; and the general prayer, for other and further relief, was added.

Separate answers were filed by Wing and wife, but not under oath (the complainant having waived answers under oath), denying the charges of fraud, and alleging that the money paid for the house and lot belonged to the statutory estate of Mrs. Wing; and in their depositions, taken in their own behalf, they stated particularly the several sources from which the money was derived by Mrs. Wing, before and since her marriage with said J. R. Wing in 1869.

On the final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, holding that "the evidence fails to satisfy the court that the property described in the bill was purchased and paid for with money belonging to the separate estate of Mrs. Wing." The defendants appeal from this decree, and here assign it as error

CLOPTON, HERBERT & CHAMBERS, and J. GINDRAT WINTER, for appellant, submitted a printed argument, in which they analyzed and discussed the evidence, and contended that it fully explained and accounted for the entire purchase-money as belonging to the statutory estate of Mrs. Wing. As bearing on the legal questions involved, they cited *Harrell v. Mitchell*, 61 Ala. 270-81; *Kirksey v. Snedecor*, 60 Ala. 192; *Jenkins v. Lockard*, 66 Ala. 377; *Lockard v. Nash*, 64 Ala. 385; *Houston v. Blackman*, 66 Ala. 559; *Smith v. Cockrell*, 66 Ala. 64; *Wright v. Smith*, 66 Ala. 514; *Copeland v. Kehoe*, 57 Ala. 246; *Coleman v. Smith*, 55 Ala. 369; *Northington v. Faber*, 52 Ala. 45.

WATTS & SONS, *contra*.—If the husband paid or furnished the purchase-money, while the title was taken in the name of the wife, the transaction is regarded as a gift or advancement by him, and the property is subject to his debts.—*Pickett v. Pipkin*, 64 Ala. 326; *Seitz v. Mitchell*, 4 Otto, 580. The burden of proof was on Mrs. Wing, to show that the money paid belonged to her; and in order to do this satisfactorily, she

[Wing v. Roswald.]

was required to explain with certainty and particularity the sources from which she derived it, the times at which it accrued, &c.—*Reeves v. McGinty*, 10 Ala. 138; *Simerson v. Br. Bank*, 12 Ala. 205; *Sims v. Gaines*, 64 Ala. 392; *Pickett v. Pipkin*, 64 Ala. 520; *Harrell v. Mitchell*, 61 Ala. 278; *Horn v. Wyatt*, 60 Ala. 297; *Potter & Son v. Gracie*, 58 Ala. 303; *McAnally v. O'Neal*, 56 Ala. 299; *Hubbard v. Allen*, 59 Ala. 288; 4 Otto, 580. The defendants' evidence falls far short of satisfying this rule, and the material discrepancies between different parts, as well as the improbability of some of the statements, leave the facts at least doubtful and uncertain. To justify a reversal of the chancellor's decision, there must be a decided preponderance of evidence against its correctness. *Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387; *Donegan v. Davis*, 66 Ala. 371.

SOMERVILLE, J.—A very careful examination of the testimony in this cause leads us to the conviction, that the decree of the City Court should be reversed, in its finding on the facts. The sole question presented for decision is, whether the property sought to be subjected to the payment of appellee's judgment belonged to J. R. Wing, or to his wife Theresa. The title having been taken in the name of the wife, the question is determined by the ownership of the money—being the sum of three thousand dollars—shown to have been paid for it. Was this the money of the wife, or of the husband, according to the preponderance of the evidence appearing in the record? We are of opinion, that the evidence shows very clearly that it belonged to Mrs. Wing, as a part of her statutory separate estate. She is shown to have had, at the time of her marriage, in 1869, the sum of eight hundred and fifty dollars. During the two years following, she earned the sum of four hundred dollars in the millinery business, to which she is proved to have industriously devoted herself. The husband, being then free from debt, allowed her to retain these earnings, which, together with her other moneys, were invested by her in real estate, the rents and profits of which were collected by or for her, never having been claimed by the husband, nor appropriated by him to his own use. There is nothing in any of these proceedings vulnerable to the assault of a subsequent creditor, without some supplementary proof of an intention to defraud, which we fail to find in the record. Her earnings, it is true, belonged to her husband; but he had the legal right to repudiate his claim to them, and allow her to retain them as her own property, there being no existing creditor liable to be prejudiced by the act. So, he could allow the rents of her property to be invested in her name, and for

[Evans, Fite, Porter & Co. v. Winston.]

her use; and they would thus become a part of the accumulated *corpus* of her separate estate, although, if he had once converted them to his own use, he would be under no obligation to account to the wife for them, and a repayment of them would be fraudulent and void as to existing creditors.—*Early & Lane v. Owens*, 68 Ala. 171; *Lee v. Tannenbaum*, 62 Ala. 501. The accumulation of the wife's property, as thus acquired, under what is shown to have been a frugal management, accompanied by judicious investments, and the receipt of five hundred dollars given her by the husband's mother, for the purpose of aiding her in purchasing a home, are facts fully sustained by the evidence; and they satisfactorily account for the possession by Mrs. Wing of the three thousand dollars in question.

It is true that we find some contradictions in the details of the appellee's evidence, as to dates, and perhaps amounts; but the essential and salient facts of the case are not shaken to such an extent as to authorize us to stamp them as a sheer fabrication, having their origin in the wicked motive of perjury on the part of the husband, the wife, and the wife's father, the witness Bailey. We place very little stress upon the failure of Wing to report the money of his wife for taxation as hoarded money. The existence of the money is undeniable. It is only a question of ownership, and, in this view, we are met by the equally repugnant fact, that he also neglected to report the money as his own to be assessed for taxation. Such criminal derelictions of duty are not so infrequent as to require courts to tax their ingenuity in finding some peculiar solution of such conduct as being remarkable or extraordinary.

The decree is reversed, and a judgment will be entered in this court dismissing the appellee's bill at her cost.

Evans, Fite, Porter & Co. v. Winston.

Bill in Equity by Creditor, seeking to have Mortgages declared and enforced as General Assignment.

1. *Marshalling assets between individual and partnership creditors.* Partnership creditors can assert no lien on partnership property, for the payment of their debts; though such lien may be worked out for their benefit, by a partner asserting his right to have the partnership effects applied to the extinguishment of the partnership liabilities; and a court of equity, in administering the effects of an insolvent partnership, will apply them primarily to the payment of partnership debts, while the

[Evans, Fite, Porter & Co. v. Winston.]

separate property of the individual partners will be devoted primarily to the payment of their individual debts.

2. *Assignment by insolvent debtor, giving preference to individual over partnership creditors.*—An insolvent debtor, in making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts.

3. *Burden and sufficiency of proof.*—The *onus* of proof resting on the complainant to establish his case, if the evidence adduced is doubtful, or in equipoise, he is not entitled to a decree.

APPEAL from the Chancery Court of Colbert.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 20th July, 1880, by the appellants, a mercantile partnership doing business in Nashville, Tennessee, against Edmund C. Winston and John M. Nail; and sought to have two mortgages, executed by said Nail to said Winston, declared a general assignment under the statute (Code, § 2126), enuring to the equal benefit of all the grantor's creditors. The complainants were creditors of said Nail, and had reduced their demand to a judgment, rendered on March 10th, 1880. The mortgages to Winston, copies of which were made exhibits to the bill, were dated respectively on the 13th January, 1877, and the 22d April, 1878; and they conveyed, with power of sale, certain lands which constituted the bulk of the mortgagor's property. The first of these mortgages purported to be given to secure the payment of a promissory note for \$150, executed by said Nail, under seal, of even date with the mortgage, and payable to said Winston on the 25th July next after date; and the other, to secure the payment of said Nail's promissory note, under seal, for \$450, of even date with the mortgage, and payable on the 25th December, 1878. On the same day this latter mortgage was executed, but at a later hour, as the defendants alleged and insisted, said Nail executed a third mortgage on the lands, conveying his equity of redemption therein to the complainants, to secure an indebtedness of \$400, as recited; but the complainants claimed that their debt then exceeded \$600, and they offered in their bill to do and perform whatever the court might require in the matter of their mortgage.

The complainants' debt was contracted for goods sold and delivered by them to Reedy & Nail, a mercantile partnership doing business in Tusculumbia, Alabama, which firm was composed of said John M. Nail and Frank Reedy, since deceased. A copy of the account, or list of the items composing it, was made an exhibit to the deposition of said Nail; the account commencing January 17th, 1877, ending July 27th afterwards, and aggregating \$605. The consideration of the first mortgage to Winston, as alleged in his answer, was "\$150 loaned to said Nail by this respondent at the time of the execution of said

[Evans, Fite, Porter & Co. v. Winston.]

mortgage;" and of the second, "\$450 loaned to said Nail by this respondent at the time of the execution of said mortgage." The consideration of the first mortgage was stated in the answer of Nail to be, "\$150 loaned at that time by said Winston to this respondent, then entering into a mercantile partnership with Frank Reedy, under the firm name of Reedy & Nail;" and of the second, "\$450, money loaned at that time by said Winston to this respondent, to enable and aid him to continue and carry on a mercantile business which he was then doing, under the partnership name of Nail & Rand, the firm of Reedy & Nail having been before that time dissolved by the death of said Reedy." The testimony of said Nail as to the consideration of these mortgages, which was all the evidence adduced, is copied in the opinion of the court. The insolvency of Nail, at the time of the execution of the two mortgages in April, 1878, was alleged and proved; though he insisted, in his answer, that the land was worth more than the amount of the mortgage debts, and no other debts against him were proved.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice, on the authority of *Perry Insurance & Trust Co. v. Foster*, 58 Ala. 502; and *Esbridge v. Abraham*, 61 Ala. 344. The complainants appeal from this decree, and here assign it as error.

WM. COOPER, for appellants, cited *Danner & Co. v. Brewer & Co.*, 69 Ala. 191; *Seaman v. Nolen*, 68 Ala. 463; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127.

BRAGG & THORINGTON, with whom was JAMES JACKSON, *contra*, cited *Bank of Mobile v. Dunn*, 67 Ala. 384; Story on Partnership, § 363; *Shirley v. Teal*, 67 Ala. 449; *Wells v. Morrow*, 38 Ala. 129; *Rogers v. Adams*, 66 Ala. 602.

STONE, J.—Creditors have no lien on partnership property, for partnership debts. The lien, when worked out for the benefit of creditors, is the copartner's right and lien, that partnership effects shall be first applied to the extinguishment of partnership liabilities. The creditor can not assert the lien, of his own mere will. The partner has a paramount right that all partnership debts shall be provided for, before individual creditors can possess themselves of his copartner's interest in the property of the firm; and when this right and lien are asserted, the creditor reaps the benefit.—*Warren v. Taylor*, 60 Ala. 218, and authorities therein collected. So, when equity administers the effects of an insolvent partnership, it applies partnership effects primarily to the payment of partnership lia-

[Evans, Fite, Porter & Co. v. Winston.]

bilities, and individual property to the payment of individual debts.—Sto. Part. § 363.

In *Bank of Mobile v. Dunn*, 67 Ala. 381, we recognized the right of an insolvent debtor, in making an assignment of all his property, to devote his individual property primarily to the payment of his individual debts. This was justifiable, and only justifiable, on the principle stated above—namely, that in the administration of a bankrupt, or insolvent debtor's assets, equity will apply individual property, first, to the payment of individual liabilities, and partnership property, first, to the payment of partnership debts.

The claim of Evans, Fite, Porter & Co. was and is a debt due from a partnership. It was contracted and incurred, either by Reedy & Nail, or by Nail & Rand, or, possibly, by each firm in part. Each firm was engaged in a retail mercantile business, and the debt was incurred in the purchase of merchandise from the complainants, who, it is reasonable to infer, were wholesale dealers. The character of Winston's claim is not very clearly defined. The testimony bearing on it is that of Mr. Nail, and none other, except the face of the bills single. They are made in the name of Nail alone. Nail's testimony, copying from his deposition, is, "The consideration of the two notes and the two mortgages executed to Edmund C. Winston, was for borrowed money from Winston, to invest, 1st, in firm of Reedy & Nail, and, 2d, in firm of Nail & Rand." As we have said, this language is not very definite. It may mean that Nail's object in negotiating the loan was to obtain funds with which to supply or replenish the stocks of the several firms. If this was so, then it would stand in the nature of a partnership liability. But this is not its necessary, or most natural meaning. To "invest in," is the language. To obtain, or purchase an interest in the several firms—in other words, to furnish his share of the capital stock, is its most natural signification; and the fact that only Nail's individual obligation was given for the repayment of the money, strengthens this view. It is not, however, necessary that the evidence in favor of this view should so far preponderate as to convince us. Evans, Fite, Porter & Co. being complainants, the *onus* of making out their case rested on them. Sufficient for Winston that the testimony was in equipoise. We may add, that we do not understand it to be controverted, that the debt to Winston is the debt of Nail alone, and that the property mortgaged was his individual property. This case, then, is brought directly within the influence of the case of *Bank of Mobile v. Dunn*, 67 Ala. 381.

The decree of the chancellor is affirmed.

[Bell v. Tyson.]

Bell v. Tyson.*Special Action on the Case for Conversion of Cotton.*

1. *Notice of unrecorded mortgage; when purchaser is not chargeable with.*—A purchaser of cotton, or other crops, is not chargeable with notice of an unrecorded mortgage on them, given to secure the payment of the purchase-money for the land, because he has knowledge of the existence of the debt for the unpaid purchase-money.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This action was brought by Vincent H. Bell, against John A. Tyson and T. P. Lightfoot, to recover damages for the defendants' conversion of certain bales of cotton, on which the plaintiff claimed to have a lien, of which lien he alleged that the defendants had notice when they received and sold the cotton; and was commenced on 6th October, 1881. The cotton was grown during the year 1880, by L. F. Martin and others, on lands which they had purchased from the plaintiff, in December, 1879. By the terms of said contract, the agreed price of the land was seventy-five bales of cotton, payable in equal annual installments, on the 1st November, 1880, 1881, 1882, and 1883, respectively; for which the purchasers gave their joint written obligations, each for the delivery of 9,375 lbs. of lint cotton on the days specified, and each containing an indorsement in these words: "If we fail to pay face value of within note, we agree to pay ten (10) bales of cotton, to class low-middling, each to weigh 500 lbs., and to be delivered in any warehouse in Montgomery, Alabama, which said Bell may designate, as rent." Bell executed a bond for title to the purchasers, conditioned "to make them good and sufficient titles to said lands, whenever all of said installments were paid," and took from them a "mortgage on said lands, and on the crops to be grown thereon during the year 1880; said mortgage to be void, so far as the crops were concerned, on the payment of the first installment, due November, 1880." This mortgage, the bill of exceptions states, "referred to and described the said written obligations, except that nothing was therein said in reference to the indorsement on said obligations above copied; and neither said mortgage nor said obligations were recorded." The purchasers took possession of the land under the contract, and raised about twenty-five bales of cotton during the year

[Bell v. Tyson.]

1880, besides other crops. On the 20th February, 1880, John A. Tyson took a mortgage from said Martin *et al.*, the purchasers, on the crops to be grown on the lands during the year 1880, to secure advances made and to be made during the year; and this mortgage he transferred on the 1st October, 1880, to said Tyson & Lightfoot, the defendants. Under this mortgage, the defendants received from said Martin *et al.* the proceeds of several bales of cotton, which amounted to \$331.82; and the evidence showed, as the bill of exceptions states, "that said Tyson & Lightfoot, at the time of receiving the same, knew that the money was from the proceeds of cotton grown on said lands. The evidence showed, also, that said Bell lived at Calhoun, in said county of Lowndes, while the defendants lived at Fort Deposit, about five or six miles distant, and they were well acquainted with each other; that each of said defendants knew that said tract of land had long belonged to said Bell, and that said Martin and others held possession in some way under him; but it did not show that either of them knew, further than is shown in this bill of exceptions, the character of the possession of said Martin *et al.* As to whether Tyson or Lightfoot had seen or heard of the mortgage to Bell, before the execution of the mortgage to Tyson, or before the transfer of said mortgage to Tyson & Lightfoot, the evidence was conflicting. Tyson and Lightfoot both swore, that they had not seen or heard of the existence of Bell's said mortgage, but had seen the notes, or written obligations, secured by said mortgage. In contradiction of this testimony, the plaintiff introduced a letter" written to him by said John A. Tyson, dated in January, 1881, in which these words were used: "I am aware of what kind a lien you hold upon Fayette Martin, as I have seen the papers; and if he does not make a better payment than he has done, I shall contend for all cotton he has made over his rent, which is ten bales. I hope you will reconsider, and take up his paper, as he is on your place, and I don't want to interfere with him." It was in evidence, also, "that said Bell had received from Martin *et al.*, on the purchase of said land, during the year 1880, sixteen and a half bales of cotton, and corn and fodder to the value of \$35.70."

On this evidence, the court charged the jury as follows: "If the only information Tyson & Lightfoot, or John A. Tyson, had of Bell's mortgage, was, that the land belonged to Bell prior to the taking of Tyson's mortgage, and that he had sold the same to the persons named in his mortgage, with the understanding that they were to pay 9,375 lbs. of lint cotton on 1st November, 1880, 1881, 1882, and 1883, with condition that, if the cotton agreed on was not paid, Bell could treat the contract as a renting, and these are all the facts, then these facts

[Welden v. Schlosser.]

are not sufficient to put the defendants on inquiry." The plaintiff excepted to this charge, and he now assigns it as error.

WATTS & SON, for appellant, cited *Hussey v. Peebles*, 53 Ala. 432; *Lomax v. LeGrand*, 60 Ala. 537; *Rees v. Coats*, 65 Ala. 256.

J. R. TYSON, and R. M. WILLIAMSON, *contra*, cited *Wilson v. Stewart*, 69 Ala. 302; *Wilkinson v. Ketter*, 69 Ala. 435.

SOMERVILLE, J.—We find no error in the rulings of the Circuit Court in this cause. The defendants were not chargeable with constructive notice of plaintiff's unrecorded mortgage, executed by Martin and others upon the crops grown upon the land which they had purchased from the plaintiff. It is shown that the defendants knew of the existence of plaintiff's claim for the purchase-money, but we are aware of no rule of law which makes notice of the existence of a debt to be constructive notice of a secret lien created by an unrecorded mortgage by which such debt is secured. The defendants were purchasers of the cotton for value, without notice; the mere knowledge of the plaintiff's claim not being sufficient to put them on inquiry as to the lien of his mortgage. The case of *Wilkinson v. Ketter*, 69 Ala. 435, is an authority conclusive of this proposition, if an authority were needed for an elementary principle so manifestly correct and reasonable in itself.

Affirmed.

Welden v. Schlosser. •

Action for Forcible Entry and Detainer.

1. *Who may maintain action.*—An action for forcible entry and detainer is purely possessory, the question of title not being involved, and can not be maintained by a person who has not had prior possession.

2. *What is forcible entry, or unlawful refusal to surrender possession.* The degree of force, or the particular wrongful acts necessary to support the action, are defined by the statutes giving and regulating the remedy (Code, § 3696; Sess. Acts 1878-9, p. 49); and among these are, "entering peaceably, and then by unlawful refusal keeping the party out of possession;" and when there is any evidence of such refusal, the plaintiff's prior possession not being denied, the question of its sufficiency is properly submitted to the jury.

3. *Evidence of title, or right to possession.*—The defendant having entered peaceably, not denying the fact of plaintiff's prior possession, but

[Welden v. Schlosser.]

claiming under an entry certificate as a homestead, he can not adduce evidence of such entry and certificate, for the purpose of showing that his subsequent refusal to surrender the possession on demand was not unlawful.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. H. C. SPEAKE.

This action was brought by F. J. Schlosser, against A. Welden, to recover the possession of a tract of land, which was described as "the south half of the south-west quarter of section 26, township 10, range 4, west;" and was commenced before a justice of the peace, on the 8th June, 1882. The complaint alleged the plaintiff's possession of the premises, and the defendant's forcible entry, on or about April 28th 1882, "whereby plaintiff was ejected from the peaceable possession of said land and its appurtenances, and still is dispossessed thereof." The cause was tried on issue joined on the plea of not guilty.

On the trial, as the bill of exceptions states, the plaintiff testified as a witness for himself, "in substance as follows: that he had bought the improvements on the premises from his brother; that in 1881 he raised a crop of potatoes on a part of the land, of which four or five acres was cleared, and a house thereon; that he slept in the house once or twice during the year, and in March, or April, tied up some grape-vines growing on the land, trimmed some peach-trees, and had some strawberries on the place; that he was a single man, and lived with his father about half a mile distant from the land; that there were two bedsteads in the house, belonging to him; that he locked up the doors in March, or April, 1882; that he met defendant, about two weeks after defendant had moved into the house, and asked him, if he was going to give up the premises in controversy; and that defendant replied, he had entered it from the Government, and intended to hold it if he could." Other witnesses for the plaintiff testified "in substance as above, except as to the conversation with defendant;" and one of them stated that he heard J. W. Heatherly, who was a brother-in-law of the defendant, say in the defendant's presence, the day after he took possession of the premises, "that defendant had gone into the house to remain there two days." The defendant himself was introduced as a witness by the plaintiff, "and testified in substance as follows: that he went to the premises on the 28th April, 1882, found the doors open, and moved in with his family; that he did not break open any doors, windows, or other part of the house, to get in; that he made no threats, and used no violence, to get in possession, or to keep the plaintiff out; that the plaintiff was not then in possession; that he did not remove or put out of doors any

[Welden v. Schlosser.]

goods or chattels in the house; that there were two bedsteads in the house, which did not belong to him, and which he did not claim; that he was using them, but had always been willing at any time to give them up when the owner demanded them; that he was claiming the premises as his own, and that neither the plaintiff, nor any one for him, had ever demanded the possession of the premises from him." The defendant's attorney proposed to prove by him, on cross-examination, that he claimed and had entered into the possession of the premises "under an entry certificate as a homestead under the United States Government;" and the certificate was produced. The court excluded this evidence, and each part of it, on objection by the plaintiff, and the defendant excepted. J. W. Heatherly, a witness for the defendant, "testified that he knew the premises, and was frequently on them in March and April, 1882; that some four or five acres had been fenced thereon, but the fences were down, and the stock going in and out; that the grape-vines and trees had been badly ruined by the stock; that he was there the day the defendant went into possession, and there was then no sign or evidence of cultivation, or that any attention whatever had been paid during that year to the vines or trees; that it was all grown up in sedge-grass and bushes."

This being all the evidence, except as to the value of the rent, the court charged the jury, at the request of the plaintiff, as follows: "If the jury believe, from the evidence in the case, that on the 28th April, 1882, the plaintiff was in the actual possession of the premises, by being on the land and working on the same, pruning the fruit-trees which were growing on the land, cutting or tying up the grape-vines, or by other acts of ownership over the premises, and was claiming the premises as his, and this a week or two before the evidence shows the defendant went into possession; then plaintiff had such a possession as would authorize him to recover in this suit." The defendant excepted to this charge, and requested the court to instruct the jury, "that they must find for the defendant, if they believed the evidence;" which charge the court refused to give, and the defendant excepted to its refusal.

The exclusion of the evidence offered by the defendant, the charge given, and the refusal of the charge asked, are now assigned as error.

GEO. H. PARKER, for appellant.—The plaintiff showed no such possession as would authorize him to maintain the action. The land was a part of the public domain, as the court must judicially know from the even number of the section, and was subject to entry under the acts of Congress. The plaintiff

[Welden v. Schlosser.]

acquired nothing by his purchase of the improvements from his brother, both of them being trespassers and intruders as against the United States.—*Merrill v. Legrand*, 2 Miss. (1 How.) 150; *Safford v. Andrews*, 8 Fla. 34; *Wellborn v. Spears*, 32 Miss. 138; *Collins v. Bartlett*, 44 Cal. 371; 2 Brick. Dig. 184, § 16. The plaintiff was not in the actual possession when the defendant entered, and a trespasser can not have constructive possession. It was only an attempt to prevent any one else from entering the land, and confers no rights which the law will protect and enforce.—*McKean v. Nelms*, 9 Ala. 507; *Singleton v. Finley*, 1 Porter, 144; *Russell v. Desplous*, 29 Ala. 308; *Wray v. Taylor*, 56 Ala. 188. The complaint alleges a forcible entry, and force is the gist of the action.—*Botts v. Armstrong*, 8 Porter, 57; *Matlock v. Thompson*, 18 Ala. 600. As the defendant's entry was peaceable, and there was no proof of force, actual or constructive, the plaintiff was not entitled to recover under his complaint, even if there had been proof of an unlawful refusal to surrender the possession on demand. But there was no such proof in fact, and the defendant was entitled to have the general charge given which was asked by him. As a recovery was sought on the ground of an "unlawful refusal" to surrender the possession after a peaceable entry, the defendant ought to have been allowed to show that his refusal was not unlawful—that it was rightful; and this he proposed to prove by his entry certificate, which was not title, nor evidence of title, but only conferred a permissive right to enter and occupy.—*Tyler on Ejectment*, 76; *Hooper v. Scheimer*, 23 How. U. S. 235. The court erred in excluding the evidence.

STONE, J.—Forcible entry and detainer was a public offense in England, made so by statute.—4 Bla. Com. 148; 1 Russ. on Cr. 421. In this, as in many other States of the Union, it is a tort, to be redressed by a civil action, which the statute gives. It is an action summary in its forms and machinery, to regain possession of realty, which has been tortiously taken, or is tortiously withheld. It is purely possessory, and can not be maintained unless the plaintiff has had prior possession. Title can not be inquired into.—Code of 1876, § 3704.

The statute defines the degree of force necessary to constitute a forcible entry. Our first statute on this subject was approved February 10th, 1805, and is found in Clay's Dig. 250. Under that statute, there have been several rulings of this court, defining what degree of force is necessary to constitute a forcible entry.—*Botts v. Armstrong*, 8 Por. 57; *Matlock v. Thompson*, 18 Ala. 600; *McGonegal v. Walker*, 23 Ala. 361.

The wrong which is sought to be redressed in the present suit, was perpetrated in 1882. Before that time, the act "to

[Falkner v. Campbell Printing Press and Manufacturing Co.]

amend section 3696 of the Code of Alabama" was approved. Pamph. Acts 1878-9, p. 49. That act, in defining what particular wrongful acts shall constitute forcible entry and detainer, makes some additions to those enumerated in the former statutes. One *addendum* is, "entering peaceably, and then by unlawful refusal . . . keeping the party out of possession." This clause is not found in any of the older enactments.

It is contended for appellant, that there is no evidence in this record that plaintiff demanded possession, before he instituted his suit. "Unlawful refusal" is the language of the statute. The plaintiff testified that, soon after defendant moved into the house, he, plaintiff, "asked him if he was going to give up the premises in controversy." Defendant replied, "he had entered it [the land] from the Government, and intended to hold it, if he could." True, the defendant in his testimony denied that any demand had been made of him; but added, "that he was claiming the said premises as his own." This was certainly enough testimony, to justify its submission to the jury on the question of unlawful refusal. We do not understand the appellant as controverting the proposition, that plaintiff had possession before, and at the time he, the appellant, took possession. He rests his defense on the assertion, that there was no evidence of a forcible entry or detainer. We have disposed of that question above, adversely to appellant. The general charge asked by appellant should not have been given. The charge given at the instance of plaintiff below is consistent with the views expressed above, and is free from error.

The testimony offered by defendant, and ruled out by the court, tended to shed no light on the question of possession. If it had any tendency, it was to show plaintiff's right and claim to the property. This was rightly ruled out.

Affirmed.

Falkner v. Campbell Printing Press and Manufacturing Company.

Bill in Equity for Foreclosure of Mortgage.

1. *Rents and profits, as between mortgagor and mortgagee.*—The mortgagor is entitled to the rents, income and profits of the mortgaged property, until the mortgagee asserts his right to them by taking possession, giving notice in the nature of a demand, or filing a bill for foreclosure,

[Falkner v. Campbell Printing Press and Manufacturing Co.]

and asking the appointment of a receiver; and where possession is taken, without objection on the part of the mortgagor, by the holder of a mortgage which is afterwards declared void at the instance of a second mortgagee, in a suit seeking an account and foreclosure, the rents accruing during his possession, from the filing of the bill, may be claimed and intercepted by the second mortgagee, at any time before they have been paid over to the mortgagor.

2. *Costs; when payable out of fund in court.*—The taxation of costs is a matter of discretion, and they may properly be taxed and made payable, in a foreclosure suit, out of any moneys in the custody of the court, belonging to any of the parties litigant, and subject to the lien of the mortgage.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 17th August, 1878, by the Campbell Printing Press and Manufacturing Company, a corporation chartered under the laws of New York, against J. M. Falkner and others; and sought the foreclosure of a mortgage which said Falkner had executed to the complainant, an account, and the marshalling of securities as between the complainant and the several defendants who claimed liens on the mortgaged property. The complainant's mortgage, which was made an exhibit to the bill, was dated the 1st May, 1877, and filed for record on the 21st May; was given to secure the payment of said Falkner's note for \$1,697.52, of even date with the mortgage, and payable six months after date; and conveyed certain personal property, which was thus described: "*The Southern Plantation* printing establishment, situated at Nos. 5 and 7 Perry street, Montgomery, Alabama, including printing presses, type, cases, stands, and all the material thereto belonging." R. H. Molton, as the administrator of the estate of Kate A. Glover, deceased, W. L. Chambers, and the partners comprising the firm of Moses Brothers, were joined with Falkner as defendants to the bill, under an allegation that each claimed some interest in the property conveyed by the mortgage, or some lien upon it; and it was alleged, also, that said Chambers and Moses Brothers had each taken possession of some portions of the property; that their respective liens were subsequent and subordinate to the complainant's mortgage, of which they had notice; or, if not subordinate and inferior, that each embraced other property, in addition to that conveyed by the complainant's mortgage, to which they should first resort, and for which they should be required to account. The bill prayed, on these allegations, that the complainant's mortgage be declared a first lien on the property; that the property be sold, and the mortgage foreclosed; that Chambers and Moses Brothers each be required to account for the property which they had taken; that an account be taken of the mortgage debt; that the priority of the respective liens be declared, if

[Falkner v. Campbell Printing Press and Manufacturing Co.]

the complainant's was not first, and the securities marshalled; and for general relief.

Moses Brothers filed an answer to the bill, and also a cross-bill in the nature of an original bill, asserting the priority of their mortgage, and asking a foreclosure thereof. Their mortgage was dated 14th September, 1876, and duly filed for record on the 24th October; was given to secure the payment of said Falkner's promissory note for \$875, of even date with the mortgage, and payable on the 14th November, 1876; and conveyed two city lots in Montgomery, together with "all the property, of every kind and description, in the *Southern Plantation* office, on Perry street in the city of Montgomery." They also held a second mortgage, dated the 18th September, 1877, and given to secure the payment of the same note; which conveyed the same personal property, and, in addition, other printing materials, consisting of type, cases, &c., which had been used in printing papers called *The Hornet* and *The Bulletin*, and were afterwards transferred to the office of the *Southern Plantation*. This cross-bill was filed on the 17th March, 1879; and Falkner, Chambers, Molton as administrator, and the complainant in the original bill were made defendants to it.

As between Moses Brothers and the complainant in the original bill, the principal matter of contest was as to the priority of their liens on a printing-press, which the complainant had sold to Falkner, the agreed price being the consideration of the complainant's mortgage and secured note, and which was embraced also in the mortgage to Moses Brothers; but, as the case is here presented, this matter is immaterial. The mortgage to Molton was dated the 8th February, 1875, and conveyed only the city lots in Montgomery: its validity and priority were admitted by Moses Brothers in their cross-bill, and no question in reference to it is raised by the record. The mortgage to Chambers was dated 1st January, 1876, and conveyed all the real and personal property embraced in the other mortgages; but its validity was assailed by Moses Brothers in their cross-bill, and by Molton in his answer to a cross-bill filed by Chambers; and on appeal to this court, at a former term, by Chambers, his mortgage was held void.—*Chambers v. Falkner*, 65 Ala. 448.

The original bill prayed for an account and decree against Chambers, "for the value of such of said property as he may be found to have disposed of, or otherwise converted to his own use;" and the cross-bill of Moses Brothers prayed, "that said Chambers be held to account for the value of the personal property received or converted by him, and for the rental value of said real estate since he has been in possession thereof." In his answers to the original bill and to the cross-bill of Moses Brothers, and also in a cross-bill filed by himself, Chambers ad-

[Falkner v. Campbell Printing Press and Manufacturing Co.]

mitted that he had taken possession, under his mortgage, of the type and printing materials conveyed by his mortgage, and had sold them, with the consent of Falkner, for \$375; and he also admitted that he had taken possession of the real estate after the law-day of his mortgage. The printing-press was sold, by agreement of the parties to the suit, for \$900, the purchaser's notes being deposited with the register to await the result of the suit; and the chancellor (Hon. H. AUSTILL) held that the complainant in the original bill was entitled to priority over Moses Brothers, in this fund. He further held that Chambers "should be required to account for the proceeds of the personal property sold by him, and for the rents of the real property realized since the filing of the cross-bill of Moses Brothers;" and ordered the necessary accounts to be stated by the register.

The register stated the accounts as ordered, and reported that the amount due the original complainant, with interest to 28th April, 1881, was \$1,541.26; to Moses Brothers, \$1,039.39; and to Molton, \$901.16. He reported, also, that the personal property sold by Chambers was worth on the 1st June, 1878, when sold by him, \$375; that the rents received by him after the filing of the cross-bill of Moses Brothers, after deducting the cost of necessary repairs, was \$287.96; and that the personal property which went into the possession of Moses Brothers was worth \$470. No exceptions were filed to the report, and it was confirmed by the chancellor at the August term, 1881; when he also rendered a decree, ordering the real estate to be sold, the proceeds to be first applied to the payment of Molton's debt, and the balance, if any, to Moses Brothers; also, ordering the proceeds of sale of the printing press, when collected, to be paid over to the Campbell Printing Press Company, in satisfaction, *pro tanto*, of the decree in their favor; requiring Chambers to pay into court, within twenty days, the \$375 and \$287.96, which he had received, as above stated; ordering the \$375 to be paid over to the Campbell Printing Press Company, and the \$287.96 to Moses Brothers, as credits on their respective debts. In October, 1881, on motion of complainant, a reference to the register was ordered, to ascertain and report the rents received by Chambers subsequent to the former report; and the sum of \$438.88 being reported, by agreement of parties, as the full amount of rents for which Chambers was responsible, that sum was paid into court by him, and he was discharged. At the same time, a petition was filed by Falkner, asking a modification of the decree, and an order that the rents received from Chambers should be paid over to him. The chancellor overruled this petition, and ordered that this fund,

[Falkner v. Campbell Printing Press and Manufacturing Co.]

"after deducting and paying out of the same all the costs of this cause," be paid over to Moses Brothers.

The appeal is sued out by Falkner, who here assigns as error the dismissal of his petition, the decree ordering the rents paid in by Chambers to be paid over to Moses Brothers, and the decree for the payment of the costs out of that fund. There was a joinder in error by the complainant in the original bill, but none of the other parties appeared.

R. M. WILLIAMSON, and GEO. F. MOORE, for appellant.

E. J. FITZPATRICK, *contra*.

SOMERVILLE, J.—The contest in the present case is between the mortgagor and mortgagee, for certain rents of the mortgaged property, which had been paid into the hands of the register by order of the Chancery Court. These rents accrued after the filing of the cross-bill by the mortgagees, Moses Brothers, in reference to the priority of whose mortgage there is no dispute as between them, and as against the other unsatisfied mortgages. The special prayer of the cross-bill was for a condemnation of these rents, then in the hands of one of the defendants, Chambers, who had entered upon the premises, and collected the rents, under a claim of right in himself. The claim of Chambers was based on a mortgage executed by the appellant, Falkner, the validity of which had been successfully contested, and which had been declared void on appeal to this court, in the case of *Chambers v. Falkner*, 65 Ala. 448. This collection being without authority, and Chambers being one of the defendants in the suit, the chancellor made an order for him to pay the money into court, which was accordingly done. It was finally decreed, that a portion of fund should be appropriated to the payment of the costs of suit, and that the balance be paid to Moses Brothers, on their mortgage debt. This action of the court is assigned for error.

The principle is too well settled in this State, either for controversy or discussion, that the mortgagor is the owner of the mortgaged premises, as against all the world except the mortgagee. He is therefore entitled to the rents, incomes and profits of the mortgaged property, so long as the mortgagee fails to disturb his possession or right by the interposition of a legal claim to them. This claim may be made, as is well settled, by filing a bill for foreclosure, accompanied with the appointment of a receiver, by taking possession, or by otherwise giving notice in the nature of a demand.—*Johnston & Stewart v. Riddle*, 70 Ala. 219; *Scott v. Ware*, 65 Ala. 174. It may be admitted, as stated in *Scott v. Ware*, *supra*, that the mere

[Lanier v. Russell.]

filing of a bill of foreclosure will not alone interrupt the right of the mortgagor to take the rents. The mortgagee must be active in the assertion of his claim, either through his own exertions, or the intervention of the court in his behalf.—*Gilman v. Telegraph Co.*, 91 U. S. 603.

The mortgagor Falkner's possession had been here disturbed, by the entry on the premises of one of the defendants, Chambers. This entry was made under power conferred in a mortgage, the validity of which the mortgagor did not at the time dispute, and which he does not assail in this suit. It may be that Chambers was a trespasser, by reason of his mortgage being void; but he was not acting for Falkner, and, therefore, cannot be deemed in law to be his agent. His possession of the disputed fund can not then be said to be that of Falkner. He must rather be considered as holding for the party entitled. The payment of this fund into court was ordered at the instance of the mortgagees, and on their motion. The demand for it by the register was, in effect, the demand of the mortgagees. Their application in this behalf, made to the court pursuant to the prayer of their cross-bill, may be considered as tantamount to a demand through the aid of judicial intervention.—*Thomas v. Brigstocke*, 4 Russell, 64 (4 Eng. Ch. 64). This demand was made before the funds reached the mortgagor's hands, and while the whole matter of litigation was *in gremio legis*. The mortgage lien of Moses Brothers thus attached before any right to the rents legally became vested in the appellant. In this view of the case, we can see no error in the action of the chancellor touching the fund in question. The taxation of costs was a matter of discretion, and they could be properly taxed and made payable out of any moneys in the custody of the court, which belonged to any of the parties litigant, and subject to the lien of the mortgages sought to be foreclosed.

Affirmed.

Lanier v. Russell.

Contested Probate of Will; Motion to dismiss Appeal.

1. *Entry of judgment or decree on verdict; when properly dated.*—When the probate of a will is contested, and an issue of *devisavit vel non* is submitted to a jury, who find in favor of the will, the judgment of the court necessarily follows the verdict, as in an action at law; and the verdict being rendered on Saturday morning, while the court is in session, the

[Lanier v. Russell.]

judgment is properly entered and dated as of that day, although the entry was not actually made until ten o'clock at night, after the expiration of office hours.

2. *Limitation of appeal.*—Thirty days being the limitation of an appeal from a judgment or decree on a contest of the probate of a will (Code, § 3954), an appeal sued out on 5th April, from a judgment rendered on 4th March, will be dismissed on motion.

APPEAL from the Probate Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

The appeal in this case was sued out on April 5th, 1882, from a judgment and decree of said Probate Court which was rendered and entered of record on March 4th preceding, and founded on the verdict of a jury returned into court on the morning of that day; and a motion to dismiss the appeal was submitted by the appellee, on the ground that it was not taken within the time prescribed by law. The suit commenced in an application by Mrs. Martha T. Russell for the probate of a paper writing, which purported to be the last will and testament of Missouri W. McCalley, and which was contested by the present appellants, heirs-at-law and distributees. An issue was thereupon formed, under the direction of the court, and submitted to a jury, who returned a verdict in favor of the will; and the judgment now appealed from was rendered on this verdict. On the trial, numerous exceptions to the rulings of the court were reserved by the contestants, and these rulings were here assigned as error. "The jury brought in their verdict," so the bill of exceptions recites, "on Saturday morning, March 4th, 1882; and the court received the verdict on that morning, discharged the jury, and adjourned, without setting a day to enter the judgment or decree on the said verdict. On Saturday night of said March 4th, between the hours of eight and ten o'clock, the court entered the judgment or decree on said verdict. The regular business (or office) hours of said court are from nine o'clock A. M. to four o'clock P. M., as prescribed by statute. No notice of the entry of said decree was given to contestants' counsel, and no notice was given them of the time when said decree would be entered; and when the decree was so entered, neither the contestants nor their counsel were present."

CABANISS & WARD, for the motion, cited the statute (Code, § 3954), and the decision of this court, at the last term, in the case of *Lanier v. Richardson*, 72 Ala. 134.

WALKER & SHELBY, *contra.*—The statute allows thirty days for taking an appeal in such a case as this, which must mean thirty full days, or "clear days," as they are called in the old

[Lanier v. Russell.]

books. If the decree had been entered during office hours on Saturday, or even after office hours, on notice, actual or constructive, to the parties interested, the time might have commenced to run from that day, and the appeal would be barred; but, having been entered Saturday night, long after the close of office hours, and without notice to the parties, that day can not be counted; nor can Sunday be counted, since it is *dies non juridicus*, and an appeal could not have been taken on that day. An appeal could not have been taken before Monday, and the statutory time must be computed from that day, even if the decree was properly entered and dated as of Saturday. A liberal construction is placed on such statutes, giving a party sometimes one day more than the strict letter of the law calls for, but never less. The appeal is from the judgment, or decree, not from the verdict; and that could not be known—it was locked up in the breast of the judge—until announced and entered.—*Green v. McCutcheon*, 40 Mich. 244; *Warren v. Slade*, 23 Mich. 1, or 9 Amer. Rep. 70; *Hillyer v. Schenck*, 15 N. J. Eq. 398; *Young v. Young*, 32 N. J. Eq. 275; *Rubber Co. v. Goodyear*, 6 Wallace, 153; *Dawson's Appeal*, 15 Penn. St. 480; *Ross v. Palmer*, 40 Penn. St. 517; *Neal v. Crews*, 12 Geo. 93; *Charleston Bank v. Gary*, 14 So. Ca. 571; *McLaughlin v. Doherty*, 54 Cal. 519; *Humphrey v. Havens*, 9 Minn. 350; *Carleton v. Byington*, 16 Iowa, 588.

STONE, J.—The judgment-entry found and certified in this record shows that the verdict of the jury was rendered, and the judgment and decree pronounced, on the 4th day of March, 1882. The appeal was prayed and taken April 5th, 1882. Excluding the first day, and including the last, there were thirty-two days between the rendition of the judgment and the grant of the appeal. The statute (Code of 1876, § 3954) requires that such appeals shall be taken “within thirty days after the determination of such contest.” An application was made to the Circuit Court for a *mandamus*, to compel the judge of probate to change the date of his judgment and decree, so as to make it bear date March 6th, 1882; but the application was denied. An appeal from that ruling was then prosecuted to this court, and the judgment of the Circuit Court was affirmed. We held, that the final judgment establishing the will was correctly dated March 4.—*Lanier v. Richardson*, 72 Ala. 134.

The present case comes before us on a motion to dismiss the appeal, as not being taken in time, and we are requested to review our former ruling. We have carefully studied the able argument of counsel, and have examined the authorities referred to. Two of them arose on judgments pronounced on

[Lanier v. Russell.]

verdicts rendered.—*First National Bank v. Gary*, 14 So. Car. 571; *Humphrey v. Havens*, 9 Minn. 318. The others arose in chancery and probate cases, where the judgment of the court remained locked up in the breast of the presiding justice, until it was formulated and formally rendered. The cases from South Carolina and Minnesota are scarcely reconcilable with our rulings in *Lanier v. Richardson*, *supra*. The other cases, growing out of chancery and probate decrees, are certainly correct, and would be so ruled by us. This, from the nature of the question. Until the decree is pronounced in such cases, there is nothing to foreshadow or indicate what it will be.

When, however, there is a trial by jury, in a common-law proceeding, and the jury returns a general verdict, the judgment, not being arrested, follows the verdict, as the conclusion follows the premises in any other syllogism. "It is therefore considered," is the language of the court, and of the law, in such cases; and if, on a proper verdict rendered, the judge trying the cause should, without setting aside the verdict, or other sufficient reason, refuse to render judgment thereon, he would be compellable to proceed to give judgment, although what particular judgment he should render would probably not be commanded. This, because *mandamus*, as a rule, can compel the exercise of the judicial function, but does not command what judgment shall be rendered.

The system and practice in our common-law courts of general jurisdiction, we think, furnish a safe analogy and guide in cases like the present. The statute directs, that the minutes of those courts must be read each morning in open court. Code of 1876, § 546. This must mean, that the minutes made by the clerk, of the court's proceedings during one day, must be read on the morning of the next succeeding day. Now, in practice, these proceedings are generally entered up after the adjournment of the court for the day; frequently, during the night, after judicial hours; and often finished up during the next morning, before the court convenes. Yet the judgment bears date, and should bear date, of the day the proceedings were had in the court. Such, we think, has been the universal custom since our judicial system was organized. Such was the rule, when our judgments operated liens on lands, without the issue of executions.—*Pope v. Brandon*, 2 Stewart, 401; *Morris v. Ellis*, 3 Ala. 560; *Campbell v. Spence*, 4 Ala. 543; *Mansony v. United States Bank*, *Id.* 735; *Quinn v. Wiswall*, 7 Ala. 645; *Bliss v. Watkins*, 16 Ala. 229; *Cunningham v. Fontaine*, 25 Ala. 644; *Dow v. Whitman*, 36 Ala. 604; *Pearson v. Darrington*, 21 Ala. 169; *Ala. Coal & Nav. Co. v. State, ex rel.*, 54 Ala. 36; *Holtzclaw v. Ware*, 34 Ala. 307.

[Moore v. Helms.]

One view of this question, it seems to us, renders our solution of the statute we have referred to, almost unanswerable. Many of our Circuit Courts—probably, a large majority of them—have limited terms, of so many days, or so many weeks. All will admit, that any judicial act, done after the expiration of the prescribed term, would be *coram non judice*. Courts are required, and usually sit, each day of the entire term. The public service demands it. The minutes of the last day's proceedings must be entered up, and it is common knowledge, as well as an irresistible inference, that this service is frequently not completed, until after the close of judicial hours of the last day; nay, frequently until after midnight of that day. Are all such judgments and orders void, because they were not entered and approved within the term the statute prescribes? If a record were to come before us, showing it was rendered one or two days after the statutory termination of the term, we would certainly pronounce it void. Would not this be the inevitable result, if we were to hold that judgments, written up after judicial hours, can take effect only as of the next judicial day? We think a judgment, following a verdict, takes effect as of the day the verdict was rendered, unless there is something in the record showing it was not pronounced on that day. The judgment in this cause shows it was rendered on the same day the jury returned their verdict in the morning.

It would seem this ruling works no hardship in this case. On the very same day—March 4th—on which the verdict was rendered, as we must suppose, counsel entered into a written agreement, made part of the record, that the *contestants* be allowed sixty days within which to prepare their bill of exceptions, and have it signed. This certainly tends strongly to show the contest was then considered at an end in that court. Would it be contended the sixty days did not commence to run until the Monday following?

Appeal dismissed.

Moore v. Helms.

Statutory Real Action in nature of Ejectment.

1. *Award, as evidence of title to land.*—When a pending suit, involving the title to land, or the right of possession for a term not yet expired, is submitted to arbitration, the award rendered, though it can not have the operation and effect of a conveyance of lands, is evidence of title, which will support or defeat an action of ejectment, or a statutory action in the

[Moore v. Helms.]

nature of ejectment; but, when set up by the defendant, it is only matter of evidence, available under the plea of not guilty, is open to contestation, and must be determined by the jury, unless a trial by jury is waived.

2. *Motion to dismiss; when allowable.*—A motion to dismiss a suit is, ordinarily, founded upon matter of record apparent on the face of the proceedings, and can not be based on extrinsic matters; unless, perhaps, on a release given, or an agreement to dismiss made pending the suit; nor can it be made to subserve the purpose of a plea in bar, or to devolve upon the court a summary determination of the merits of the case.

3. *Admission of facts; not amounting to waiver of trial by jury.*—An admission of the facts, upon which a motion to dismiss the suit is founded, is not a waiver of a trial by jury, nor equivalent to an agreement to substitute the court for the jury as a trier of the facts.

APPEAL from the Circuit Court of Coffee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Thomas Moore, against Melton Helms, to recover the possession of a tract of land, with damages for its detention; and was commenced on the 8th October, 1880. At the October term, 1881, a judgment on verdict was rendered for the defendant; but, at the same term, a bill of exceptions was reserved, in which the facts are thus stated: "On the trial of this case, the following proceedings were had: The defendant moved the court to dismiss the cause, upon the ground that, heretofore, one W. B. Halstead brought his suit in this court, in the statutory form of ejectment, against the plaintiff in the present action, to recover the same lands involved in this suit; that said former suit, and the question of the title to said lands, was submitted to arbitration by the parties thereto; that the arbitrators decided said suit in favor of said Halstead, and that he was the owner of said lands; and that the defendant in this present action derived his title and possession from said Halstead. The statements in the said motion being admitted as facts, the court thereupon granted the said motion, and dismissed the suit; and the *defendant*(?) excepted." The appeal is sued out by the plaintiff, and the judgment dismissing the suit is assigned as error.

J. E. P. FLOURNOY, for appellant.

BRICKELL, C. J.—It may be that, if there was a former action pending between the plaintiff and Halstead, under whom the defendant derives title to the lands, involving the question of title, or the right to possession for a term not yet expired, which was submitted to arbitration, and, in pursuance of the submission, an award was rendered determining the question against the plaintiff, the award would bar the plaintiff from a recovery in the present action. An award, though it can not have the operation and effect of a conveyance of lands, is evidence of title, upon which ejectment, or the corresponding statutory real ac-

[Young v. Hawkins.]

tion, may be supported or defeated.—Adams on Ejectment, 92; Tyler on Ejectment, 206. But, if this be true, the award is matter of evidence under the plea of not guilty, as is any fact showing that the plaintiff has not title, or has not a right to possession; and it is open to contestation, as are all facts relating to the title or right of possession, and must be determined by the verdict of a jury, unless a trial by jury is waived, and the court is substituted as the trier of the facts.

2. A motion to dismiss a suit is, ordinarily, founded upon matter of record, apparent upon the face of the proceedings, because of some imperfection, gap or chasm, caused by the act or neglect of the plaintiff, or because of his disobedience to orders of the court; unless, perhaps, it is founded upon a release given, or an agreement to dismiss made pending suit. It can not be founded on matters extrinsic to the record; nor can it be made to serve the purpose of a plea in bar; nor can it devolve upon the court the determination summarily of the merits of the case.—*Allen v. Lewis*, at present term. P. 379.

3. It is true, the plaintiff admitted the facts upon which the motion to dismiss was founded; but that admission can not be construed into a waiver of a trial by jury, nor into an agreement to substitute the court as the trier of the facts. Nor was there an admission that the award was unimpeachable; and it is open to impeachment, whether it is specially pleaded, or only given in evidence to conclude the plaintiff. Upon this motion, the court ought not to have determined the merits of the case, but ought to have remitted the parties for trial to a jury.

Reversed and remanded.

Young v. Hawkins.

Bill in Equity to enforce Vendor's Lien on Land.

1. *Promise for benefit of third person.*—A promise to one person, to pay a debt due from him to another, enures to the benefit of the latter, and may be enforced by him.

2. *Election.*—No make an election binding, the party must have knowledge of the facts between which he is required to choose; and hence, when the holder of a note, given for the purchase-money of land, is a non-resident, the recovery by him of a judgment on the note can not be deemed a renunciation of promises to pay it by sub-purchasers of the land, when it is not shown that he had knowledge of such promises.

3. *Vendor's lien; who may assert, where land has been sold several times.*—Where the purchaser of lands agrees, in part payment of the agreed price, to pay his vendor's outstanding note to a third person,

[Young v. Hawkins.]

which is a lien on the land, and afterwards sells to a sub-purchaser, who makes a similar promise to pay the outstanding note; a payment of the note by such sub-purchaser would extinguish the lien on the land, and the liability of each of the parties; a payment by the purchaser would give him a right to enforce the vendor's lien on the land, as against the sub-purchaser; and a payment by the maker of the note, to whom the first promise to pay it was made, would give him a similar right to enforce the lien; but the latter can not maintain a bill in his own name alone to enforce the lien, when he has not paid the note, although the holder has recovered a judgment on it against him.

4. *Same; parties; variance.*—On this state of facts, the holder of the note is a necessary party to the bill, or the several contesting claimants, if there is a dispute as to the ownership of it; and the bill must allege the special facts which show that the maker of the note is remitted to his former right to enforce the lien, else the variance will be fatal to relief.

APPEAL from the Chancery Court of Etowah.
Heard before the Hon. N. S. GRAHAM.

DENSON & DISQUE, for appellants.—(1.) The complainant's own testimony shows that he has no interest in the subject-matter of this litigation, and hence no right to maintain the suit; that he has never paid his outstanding note, which belongs to Mrs. Waters, and to whom Young promised to pay it. *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Winter v. Merriek*, 69 Ala. 86; *Bryan v. Hendrix*, 57 Ala. 387. (2.) If the contract between Hawkins and Young was, as the proof shows, that Young's promise to pay the outstanding note of Hawkins was taken and accepted by Hawkins in absolute payment and extinguishment, *pro tanto*, of so much of the purchase-money agreed to be paid by Young, then there is no debt between Hawkins and Young, and hence no lien.—*Dennis v. Williams*, 40 Ala. 633; *Carriere v. Ticknor*, 26 Ala. 571; *Brewer v. Bank*, 24 Ala. 439; *Bradford v. Harper*, 25 Ala. 347; *Schnebly v. Ragan*, 28 Amer. Dec. 198; *Patterson v. Edwards*, 29 Ala. 67; 2 Pom. Eq. § 1252; Jones on Mortgages, §§ 194–98. (3.) The judgment in favor of Mrs. Waters, if she is the owner of the note, is a lien on the land; and a payment by the defendants of the decree here obtained against them by Hawkins, would not discharge the land from that lien, she not being a party to the suit.—*Griffin v. Camack*, 36 Ala. 695; *Yerby v. Sexton*, 48 Ala. 311–25; *Black v. Zacharie*, 3 Howard, 483; *Kelly v. Payne*, 18 Ala. 371.

TURNLEY & TURNER, and DUNLAP & DORTCH, *contra*, cited *Carver v. Eads*, 65 Ala. 190; *Bankhead v. Owen*, 60 Ala. 457.

STONE, J.—The present is a snit by Hawkins against Young and Hood, to enforce an alleged vendor's lien. The

[Young v. Hawkins.]

bill makes the ordinary case of a sale and conveyance of certain lands by Hawkins to Young, of putting the vendee in possession, and avers that two hundred and fifty dollars of the promised purchase-money, with interest, remain unpaid. The bill then avers that Young subsequently sold and conveyed the lands to Hood, and that the latter purchased with knowledge of such unpaid purchase-money. The bill on its face clearly contains equity, and the demurrer to it was rightly overruled.

The answer denies that any unpaid purchase-money promised to be paid to Hawkins remains unpaid, and rests for its support on the following state of facts: The lands in controversy formerly belonged to John Payne, father-in-law of Hawkins. Payne had had six children, some of whom had died, leaving children. Payne sold and conveyed these, with other lands, to Hawkins and to Rains, another son-in-law, at the agreed price of fifteen hundred dollars, for the purpose of dividing the proceeds among his descendants, or lines of descendants. Two of the shares, falling to the wives of Hawkins and Rains, were left with their husbands, the purchasers. For the remaining thousand dollars, four notes were given, payable to Payne, each in the sum of two hundred and fifty dollars; two of these notes made and executed by Hawkins, and two by Rains. Payne thereupon set apart these four several notes to his other lines of heirs, one to each line separately. Soon after this Payne died. Hawkins has never paid either of the notes he thus gave in the purchase of the land. Hawkins and Rains then agreed on a division of the lands purchased, and interchanged deeds accordingly. Hawkins sold and conveyed his allotted share of the lands to Young, at the agreed price of one thousand and fifty dollars. Five hundred and fifty dollars of this sum Young paid, partly in cash, partly in relieving incumbrances created by Hawkins: and for the residue of it, gave his note payable to Mrs. Hawkins, which he has since paid. He gave no writing in relation to the five hundred dollars remaining, but promised Hawkins he would pay his, Hawkins', outstanding two notes for purchase-money, to the rightful holders of the notes, when found out. Young subsequently sold and conveyed the lands to Hood, who, as part purchase-money, promised to pay Hawkins' two outstanding notes, when their owners should be ascertained. Hood has paid one of these notes. The other remains unpaid, and it is claimed there is some dispute as to its ownership. Complainant claims it is the property of Mrs. Waters, who has recovered judgment thereon against Hawkins, he making no defense thereto. Execution on this judgment has been returned "No property found." The above line of defense is relied on in the pleadings, and is fully sustained by the testimony.

[Young v. Hawkins.]

Much is said in argument about there being one or two debts. Technically there are two; the debt of Hawkins, evidenced by his note, and the promise or debt, first of Young, and then of Hood, to pay that debt. Equity cares but little about the forms of things. When Mrs. Waters, or the rightful owner, is paid, then she has no further claim on any one. If the payment be made by Hood, that will extinguish all the liabilities. There will then be no debt to or from any one. If payment be made by Young, then he has a claim on Hood, secured by a lien on the land. If the payment be made by Hawkins, then he has a claim on Young, and a lien. The promise he procured to be made to the owner and holder of the note will then enure to him.—*Kelly v. Payne*, 18 Ala. 371; *Buford v. McCormick*, 57 Ala. 428.

Another preliminary question may be considered. It is contended that, by reducing the claim to judgment against Hawkins, Mrs. Waters has elected to renounce the security offered her in the promises of Young and Hood, and to rely on Hawkins for payment. We need not decide whether, in any case, this would be so. Mrs. Waters is shown to be a resident of Texas, and it is no where shown she was ever notified that the promises, either of Young or Hood, have ever been made for her benefit. Parties, to make a binding election, must have knowledge of the facts, between which they are required to choose.—*Reaves v. Garrett*, 34 Ala. 558; *Adams v. Adams*, 39 Ala. 274.

It can not be denied, that if Hawkins, after making the sale to Young, had extinguished the liability on the note Young had promised to pay, Young, and probably Hood, would have thereby become liable to pay the money to Hawkins, and he could then have maintained a bill against the two, and against the land.—*Bunkley v. Lynch*, 47 Ala. 210. So, Mrs. Waters, or whoever may be the rightful owner of Hawkins' unpaid purchase-money note, may maintain a bill against Young and Hood, and the land, on the promises to pay that note, given in the several purchases made of Hawkins' allotted interest in the land.—*Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33. But, to maintain a bill by Hawkins alone, on the state of facts first above supposed, it is necessary to aver the special facts which re-vest in Hawkins the right to demand and receive the money. This, because Young was not required to promise, and did not promise, to pay the money to Hawkins. The consideration moved from Hawkins, and the promise was made to him; but the promise was to pay the money to the holder of the note, and it was procured to be so made by Hawkins himself. The bill in this case does not aver the special facts which would authorize Hawkins to maintain the bill in his own name,

[Motes v. Bates.]

and there is consequently a variance between the allegations and proof, which forbids relief in the present frame of the bill. 1 Brick. Dig. 743, § 1538; *Lewis v. Montg. B. & L. Asso.*, 70 Ala. 276.

In this case, however, it is not enough to amend only the averments of the bill. The owner of the note, to whom the money is due, should be made a party, that such interest may be properly protected, and the money decreed to the proper party; and if there be a dispute about the ownership, all contesting claimants should probably be brought before the court. Mrs. Waters, if the rightful owner of the note, might be made a co-complainant. Or Hawkins, by making the claimant or claimants of the note parties, may possibly maintain a bill, to compel Young and Hood to pay the money, in exoneration of the liability resting on him. They are legally bound to pay that note—are bound to relieve Hawkins from it; and has he not an equitable right to compel them to do so, and to have the land subjected to its payment, if necessary? As to this debt, they are under a primary obligation to Hawkins to pay it, and the lands are under an equitable lien for its performance.—3 Pom. Eq. § 1417; 2 Story's Equity, § 849. We, however, simply offer the suggestions, without intending to decide them absolutely.

The decree of the chancellor must be reversed, and the cause remanded.

Motes v. Bates.

Action for Malicious Prosecution.

1. *Infancy not relevant evidence.*—In an action for a malicious prosecution, the fact that the plaintiff was a minor at the time of the alleged assault and battery by him, on which the prosecution was founded, is not relevant to the issue of malice or probable cause, and is not admissible as evidence.

2. *Conduct of prosecutor connected with arrest; admissibility as evidence.*—The conduct and movements of the prosecutor on the day of the plaintiff's arrest, while he was in the custody of the sheriff and attempting to give bail, are competent evidence for the plaintiff, as tending to show the degree of interest on the part of the defendant in the prosecution, and bearing on the question of an improper motive on his part.

3. *Argument of counsel.*—As to the latitude allowed counsel in this case, in his argument to the jury, which was excepted to, "the most that can be said is, that he has taken great latitude in deducing questionable inferences from facts already in evidence;" but the case is not brought within the rule laid down in the case of *Cross v. The State* (68 Ala. 476),

[Motes v. Bates.]

the enforcement of which must necessarily be regulated, to a large extent, by the sound discretion and good judgment of the primary court.

4. *Easement or license to lessee, to pass through lessor's lands*.—The lessee of rented lands, which are accessible from the public road, has no right to use a shorter route across the other lands of the lessor, without his permission, express or implied; and if such permission can be implied from his use of the shorter route without objection, it is only a parol license, and revocable at pleasure; and after revocation by express prohibition or warning, the further use of the shorter route, by either the lessee or his tenants and servants, is a trespass.

5. *Trespass on lands; repelling by force*.—When the owner's possession of lands is invaded by a trespasser, who refuses or fails to leave on request, the owner may employ such force as may be necessary to remove the intruder, but no more.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Joseph E. Bates, against P. A. Motes, to recover damages for an alleged malicious prosecution for an assault and battery; and the trial was had on issue joined on the plea of not guilty. The particulars of the difficulty between the parties, out of which the prosecution grew, are stated in the opinion of the court. While the plaintiff was testifying as a witness for himself, as the bill of exception states, "the court permitted him to testify, against the objection of the defendant, that on the day of the difficulty he was under twenty-one years of age—that he was twenty years and six days old;" and to this ruling the defendant excepted. The plaintiff was permitted to testify, also, against the objection of the defendant, "that on the day he was brought to Troy in the custody of the deputy-sheriff, and whilst at the gate of the inclosure around the jail, he saw the defendant pass near where he was, and peep around the corner at him;" and to the admission of this evidence an exception was reserved by the defendant. The plaintiff further testified that, when the sheriff came up to the gate at which he was standing, "he asked for time to make bond, and to send for his uncle, some miles in the country, to come and make his bond; that the sheriff said he would do so, and left him; that he saw the defendant, soon afterwards, cross the street, and walk along with the sheriff; that the sheriff soon returned, and said that he could wait no longer, and that he would have to put him (plaintiff) in jail, and did then put him in jail. The defendant moved the court to exclude this evidence from the jury," and excepted to the overruling of his motion.

The bill of exceptions purports to set out all the evidence adduced on the trial, and states, among other things, that the defendant's son, who was a participant in the difficulty, was sworn as a witness for the defendant, but was not examined. "The plaintiff's counsel, in his concluding argument to the jury,

[Motes v. Bates.]

remarked, that it was a suspicious circumstance that the defendant did not put his son on the stand as a witness, as he was present at the difficulty between the parties; that the circumstance showed there was something wrong on the part of the defendant. The defendant's counsel objected to this remark, as improper, and as not sustained by the evidence; but the court declined to interfere, and allowed the counsel to proceed;" to which action and refusal the defendant excepted. The plaintiff's counsel, in the further progress of his argument, "charged that the defendant was running around with the sheriff, to prevent the plaintiff, 'a mere boy,' from giving bond to keep out of jail;" and to this remark there was objection duly made by the defendant, and exception reserved.

The court charged the jury, on the request of the plaintiff, as follows: "If the jury believe, from the evidence, that the plaintiff was wrongfully in the path, but had a right in the field, then the defendant had no right to put him out of the field—that his only right extended to putting him out of the path." To this charge the defendant excepted, and he now assigns it as error, together with the other rulings to which, as above stated, he reserved exceptions.

N. W. GRIFFIN, for appellant.

J. D. GARDNER, *contra*.

SOMERVILLE, J.—The present action is one for malicious prosecution, instituted by the appellee, Bates, against the appellant, Motes, who was defendant in the court below. The prosecution complained of, as the basis of the action, was an indictment for assault and battery. It was shown that this prosecution had terminated in the acquittal of the accused, who is the plaintiff in this suit. The contested issues were as to the existence of *malice*, and of *probable cause* on the part of the prosecutor, who, of course, is here the defendant.

1. The fact that the plaintiff was *a minor*, under twenty-one years of age, *at the time of the alleged assault and battery*, for which he was indicted at the instance of the defendant, was obviously irrelevant, and the court erred in allowing proof to be made of it in the present suit. It had no proximate tendency to establish the proof or disproof of the principal issue—bearing neither upon the question of malice, nor of probable cause. Its only effect would be to excite the sympathy of the jury, and thus tend to aggravate the amount of damages recovered, through an instrumentality not to be justified in the eye of the law, which gauges its results by the rules of justice and not of sympathy.

[Motes v. Bates.]

2. We can see no objection to that portion of the plaintiff's testimony, in which he alluded to the conduct and movements of the defendant on the day of the plaintiff's arrest, and while he (the plaintiff) was in the custody of the deputy-sheriff, making effort to give bail. This evidence tended to show the degree of Motes' interest in the prosecution; and it was a question for the jury to determine, as to how far it indicated the existence of any improper motive on his part.

3. It is objected that the court below allowed the plaintiff's counsel too wide a latitude, in his comments upon the evidence discussed before the jury. In the case of *Cross v. The State*, 68 Ala. 476, we announced the principles which, in our judgment, should govern in cases of this character; and these rules were re-affirmed in the case of *Wollfe v. Minnis*, at the present term. We see nothing in the discussion of counsel in this cause, which we can safely say is so obnoxious to criticism as to be violative of these principles, the enforcement of which must necessarily be regulated, very largely, by the sound discretion and good judgment of the *nisi prius* court. It is not contended that counsel has gone out of the record, so far as to state *as facts* matters not in evidence. The most that can be said is, that he has taken great latitude in deducing questionable inferences from facts already in evidence. We can not perceive that he has, in doing this, infringed any rule of law, which will authorize a reversal of the cause, apart from other errors in the record.—*Cross v. The State*, 68 Ala. 481–483.

4. There is but one other question necessary to be discussed, and this is raised by the charges given by the court on the request of the plaintiff. It has reference to a portion of the evidence detailing the circumstances of the alleged assault and battery perpetrated by plaintiff on the defendant, upon which was based the prosecution constituting the *gravamen* of this suit. The purpose of this evidence was to show want of probable cause, as well as the existence of malice, in the prosecution. The defendant had rented to the plaintiff's brother a few acres of land in a large field belonging to defendant, and the plaintiff was employed by the lessee to aid in cultivating it. This rented land was accessible by a *public road*, and also by a *private path*, which was the shorter route; the latter leading through an uncultivated portion of defendant's field. It was agreed, at the time of the renting, that the lessee should use the public road, in going to, and returning from the rented land. The plaintiff, however, persisted in using the private path, although several times forbidden its use. Upon the day of the difficulty, the defendant and his son met the plaintiff coming along the path. The defendant "told plaintiff to turn back, and go out of the path, and go to his field the other way;"

[Motes v. Bates.]

to which plaintiff replied, "that he *would go that way or die.*" The difficulty thereupon ensued, the defendant being armed with a gun, his son having a small stick, and the plaintiff a razor. The defendant ordered his son to "*put the plaintiff out;*" and the son is shown to have approached the plaintiff, in apparent obedience of the father's command. The question is as to the relative rights of the plaintiff and defendant under this state of facts.

We find no evidence in the record, tending to show that the plaintiff, Bates, had any claim of legal right to be upon this portion of the defendant's field. It is shown that the lessee agreed to use the public road; and his employees, or sub-tenants, had no greater rights than he had. If the plaintiff's alleged custom in using the pathway, for some time previous, could be construed into a permission by defendant to do so, this was, at best, only a parol license, *which was revocable at the pleasure of the person giving it.* Every license of this kind, by which one is permitted without, consideration, to pass over the lands of another, is essentially revocable in its very nature, its continuance depending upon the mere will of the person by whom it was created, or granted.—3 Kent. Com. 452; *Ricker v. Kelly*, 18 Amer. Dec. 40-41, note; *Riddle v. Brown*, 20 Ala. 412.

The warning previously given by defendant, Motes, forbidding him to use this pathway, operated as a revocation of any parol or verbal license which may have been inferentially implied. After this warning, the plaintiff's entry upon this portion of defendant's land, without some legal cause, or good excuse, of which the record discloses no evidence, not only made him a trespasser, but rendered him liable to prosecution for a misdemeanor, upon proof that the warning was given within the six months preceding the unlawful entry.—Code, 1876, § 4419; *Watson's Case*, 63 Ala. 19.

5. The possession of the defendant being unlawfully invaded, he had a right to employ force to remove the intruder, if the latter failed or refused to go on request. He could, of course, employ only so much force as was necessary, and no more.—Cooley on Torts, 167-168.

The charge of the court tended to mislead the jury, both as to the rights of the defendant, and the proper construction of the command given his son. The plaintiff had no right to intrude upon any portion of defendant's field, except the public road and the rented land. Motes had a right to use such force as was necessary to put him *out* or *off* of any *other* portion of his premises, upon his refusal to leave on request. What defendant meant by his order—"put him out"—must be interpreted by his previous warning to the plaintiff, requesting him

[Allen v. Lewis.]

to "turn back. and *go out of the path*, and *go to his field the other way*." If it be doubtful whether he meant to command a legal or an illegal thing, the law will not impute to him an illegal intention, if a legal one will reasonably comport with a sound construction of the words used.—*Russell v. The State*, 71 Ala. 348. We may add, that the law is righteous in its judgments, and never unjustly imputes to its subjects the criminal purpose to violate its provisions. No difficulty can arise in the application of these rules upon the occasion of another trial.

Reversed and remanded.

Allen v. Lewis.

Bill in Equity for Rescission of Contract, Cancellation of Deed, and Account of Rents and Profits.

1. *Costs in equity*.—In equity, as a general rule, costs may be decreed against either party, or may be apportioned, at the discretion of the chancellor; and an error in this regard, if there be nothing more in the case, is not a ground of reversal.

2. *Same*.—To call this discretionary power into exercise, the cause must have been submitted, either in whole or in part, to the chancellor for decision; and this is not done where the complainant dismisses his own suit, thereby assuming the costs he has caused. But, where the defendant, after answer filed, buys his peace, or purchases the complainant's asserted cause of action; the complainant binding himself to dismiss his suit, but failing to do so, whereby the defendant is forced to set up the release by supplemental or amended answer; and the cause is then submitted on his motion to dismiss the bill, in accordance with the stipulation in the release; the judicial functions of the court are called into exercise, and the decree as to costs is not revisable.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 12th March, 1880, by John Lewis, against John A. Allen and others; and sought the rescission of a contract, by which complainant sold and conveyed to said Allen a tract of land, a cancellation of the conveyance, and an account of the rents and profits of the land while in the possession of the several defendants. The land contained eighty acres, and the price paid was \$15. The complainant had bought the land from one Culver, and had paid for it, but had not received a conveyance; and Culver afterwards executed a conveyance, at the instance of complainant, to said John A. Allen. The contract between complainant and said Allen was made in April, or May, 1877; and the com-

[Allen v. Lewis.]

plainant sought a rescission of it, on the grounds of fraud and inadequacy of consideration. The bill alleged, that there was a valuable deposit of coal on the land, which made it worth several thousand dollars; that this fact was well known to said Allen when he proposed to buy the land, he having had it examined by experts; that he falsely represented to complainant, who was of weak mind, and reposed great confidence in him, that there was no coal on the land, and that he wished to buy it for a homestead, being advised by physicians to move up on the mountain for the benefit of his health; that Allen in fact bought the land for the benefit of a company, or partnership, composed of himself and ten others (all of whom were made defendants to the bill), who were engaged in mining for coal, and to whom he afterwards conveyed ten-elevenths of the entire interest in the land; that said defendants engaged for a while in mining for coal, and afterwards leased the land to John B. Gordon, E. C. Gordon, and W. S. Gordon (who were also made defendants to the bill), who paid them a high rent, and were digging coal on the land when the bill was filed. An answer to the bill was filed by said John A. Allen, in which he denied all the charges of fraud, and the allegations of facts tending to show fraud, misrepresentation, or inadequacy of consideration; and he alleged that the discovery of coal on the land, and the formation of a company for mining it, were subsequent to his purchase. B. B. Allen, who was the father of said John A., and one of the company to whom he had sold the principal interest in the land, joined in this answer; and he afterwards filed an amended answer, pleading that he was a purchaser for valuable consideration without notice. A "joint and several answer and plea" was also filed by the other members of the company, or partnership, in which two other persons joined who were not mentioned in the bill, as the names are copied in the transcript. No answer was filed by the Gordons, nor was any decree *pro confesso* taken against them.

At the January term, 1882, as the minute-entry recites, "the defendants who have answered move the court for leave to file a supplemental answer, setting up supplemental matter, being a deed of conveyance from complainant and wife to John A. Allen, executed January 16th, 1882, and also to dismiss the bill of complaint, as per the terms of said conveyance, which is made an exhibit to said answer; and on motion of complainant's solicitors, said motion to dismiss is continued, and said cause is also continued." This deed, as shown by the exhibit, recites the pendency of this suit, and the present payment of one hundred dollars as its consideration; and the grantors, complainant and wife, in consideration thereof, sell and convey to said John A. Allen, "his vendees and assigns,"

[Allen v. Lewis.]

all their title and interest in the land, release them from all liability for rents and profits, and agree to dismiss the suit at the next term. At the next term, the cause being submitted upon these motions, the chancellor rendered a decree dismissing the bill, and then proceeding thus: "And it also appearing that the said defendant John A. Allen paid to the said complainant a sum of money therein named, in consideration of the said deed and the title in fee thereby conveyed, and that the matters in controversy between said parties, complainant and defendants who pleaded and answered, were thus arranged and settled, and that all claim of the complainant 'to damages, rents, issues and profits in said land,' was thus 'acquitted and released;' it is therefore further ordered and decreed, that the said defendants, John A. Allen, Jesse W. Isbell, John Berry, William Berry, Samuel Latham, Jonathan Latham, and William Latham, pay the costs of this suit; for which let execution issue."

The appeal is sued out by these defendants, and they here assign as error the decree imposing the costs on them.

ROBINSON & BROWN, for appellants, cited 3 Danl. Ch. Pr., §§ 1516, 1547; 2 *Ib.* 1380-81; *Brooks v. Byam*, 2 Story's Rep. 553; Beames on Costs, 22 Law Library, 3, 4, 29; 6 Vesey, 41. mar.; 18 Vesey, 423; 2 Beasley, N. J. Eq. 211; 7 Halst. 363; 2 John. Ch. 317.

STONE, J.—As a general rule, costs in equity may be decreed against either party, or may be apportioned, in the discretion of the chancellor; and an error in this regard, if there be nothing more in the case, is no ground for a reversal. 1 Brick. Dig. 733, §§ 1374-5. We have rulings which slightly modify this rule, and hold that, if a substantial question be presented on appeal, the decree may be varied as to costs, although affirmed in every other material point.—*Ib.* § 1379. We need not say whether we approve this doctrine or not, as it does not arise in this case.

The rule we have announced is certainly a sound and just one. It enables the chancellor to impose the burden of the litigation where he finds the fault to lie; or to apportion the burden, where there has been mutual fault. But, to call this discretion into exercise, the cause, either in whole or in part, must have been submitted to him for decision and decree. The judicial mind must have acted on some question of merit in the cause, before there can be a subject or predicate on which to exercise discretion.

The present case did not progress beyond the pleadings. There was an original bill, answers, and amended answers. If, at this stage of the case, the complainant had dismissed his case

[Sykes v. Shows.]

by his own act, and not by any decree of the chancellor pronounced on pleadings or evidence, then it could not be said the judicial mind was called to act in the controversy. The case would have presented no field for the exercise of discretion. Whenever an actor or plaintiff declines to proceed further, and dismisses his own suit, he thereby takes on himself the costs he has caused to be incurred.—2 Dan. Ch. Pr. 1376* *et seq.*; Beames on Costs (22 Law Library), 228*; *Cooth v. Jackson*, 6 Ves. 12, 41; *Brooks v. Byam*, 2 Sto. Rep. 553; *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Saunders v. Frost*, 5 Pick. 259; *Den v. Pidcock*, 7 Halst. 363; *Bruce v. Gale*, 2 Beasley (N. J. Ch.), 211; *Moses v. Dade*, 58 Ala. 211; *Wykam v. Wykam*, 18 Ves. 395, 423.

The present case is presented in a different aspect. After the original bill and the original answers were filed, the defendants purchased their peace, or purchased the complainant's cause of action. One term of the contract was, that complainant was to dismiss his suit. This he failed to do, and defendants were forced to set up the release, in bar of the further prosecution of the suit. They did this in an amended answer. They probably should have raised it by cross-bill; but no objection was made to the form of its presentation. *Moses v. Dade*, 58 Ala. 211; *Jones v. Clark*, at present term. Being raised by the pleadings, and the case going off on that defense, the exercise of the judicial function was necessarily called into requisition. This case is, therefore, brought directly within the rule, which allows to the chancellor a discretion in the imposition of costs; a discretion which we can not revise.

Affirmed.

Sikes v. Shows.

Statutory Real Action in nature of Ejectment.

1. *Description in deed of premises conveyed.*—When a conveyance of lands contain both a general and a particular description of the premises, and the two are repugnant to each other, the particular description will control, and the other will be rejected as false.

2. *Same; parol evidence identifying premises sold.*—When the premises conveyed are described in the deed as "Lot No. 2, of Square No. 8, in the town of R., being *twenty* feet in front, and running back one hundred and ten feet," and it is shown that the lot is in fact *thirty* feet front, parol evidence is admissible to show that the part sold and intended to be conveyed, and of which possession was delivered to the grantee, was the twenty feet front on the east side of the lot.

[Sykes v. Shows.]

3. *Acknowledgment of conveyance, without attestation.*—The acknowledgment of a deed dispenses with the necessity of attestation (Code, § 2146), even when the grantor makes his signature by mark only.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Warren T. Shows, against Thomas A. Sikes, to recover the possession of a parcel of land which was described in the complaint as "Lot No. 2, of Square No. 8, in the town of Rutledge, in said county and State," with damages for its detention. The defendant entered a disclaimer "as to the *twenty* feet front on the east side of said lot, running back one hundred and ten feet," and pleaded not guilty "as to the *ten* feet front on the west side of said lot;" and issue was joined on this plea. The plaintiff claimed the premises under two deeds executed to him by the defendant (and his wife), dated respectively on the 20th February, and 30th May, 1879, each conveying a half interest "in the following lot, or parcel of land, lying and being situated in the town of Rutledge, in said county and State, to-wit: Lot No. two (2), of Square No. eight (8), being twenty (20) feet in front, and running back one hundred and ten (110) feet." There was no attesting witness to either of these deeds, and each was signed by Mrs. Sikes, the defendant's wife, by mark only; but to each was affixed a certificate of acknowledgment before a justice of the peace, in the form prescribed by the statute. When these deeds were offered in evidence on the trial, the defendant objected to the admission of each, "1st, because there was no attesting witness to the signature or mark of Mrs. L. E. Sikes; 2d, because said deed was not relevant to the issue before the jury; and, 3d, because the same was illegal evidence as to the ten feet on the west side of said lot." The court overruled these objections, and admitted the deeds as evidence; and the defendant duly excepted. The plaintiff, testifying as a witness for himself "as to the dimensions of said lot No. 2, stated that said lot was thirty feet front, by one hundred and ten feet in depth." The defendant objected to the admission of this evidence, because it varied and contradicted the recitals of the deed; and he excepted to the overruling of his objections. "The plaintiff further testified, that under said deeds he was placed in possession of twenty feet front on the east side of said lot, running back one hundred and ten feet, and of the grocery-house thereon; that he never was in the actual possession of the ten feet on the west side of said lot, which was covered by a part of the defendant's stable, and of which said defendant and his tenants had been in the actual possession ever since the making of said deeds, and long before. It was in proof, also, that said lot No. 2 was in fact thirty feet front. The defendant was

[Sykes v. Shows.]

then put on the stand as a witness for himself, and testified that, before the execution of said deeds, plaintiff proposed to buy the grocery-house situated on the east side of said lot No. 2, and he (defendant) agreed to sell it to him, but that he would not sell more than twenty feet front, which was about the ground covered by the front of the grocery; that he and the plaintiff went to a stake at the south-east corner of the lot, and stepped in front of the grocery-house twenty feet, or about that distance, to an alley between the grocery and the livery-stable, and, pointing down the alley, stated that the lot would run about to a plank fence; and that he (defendant), plaintiff not being present, then went over to F. M. Cody, and had the deed written out, signed the same, and afterwards delivered it to the plaintiff." The court excluded this testimony of the defendant, on motion of the plaintiff, and the defendant excepted. This being all the evidence, except as to the value of the rents, the court charged the jury, that they must find for the plaintiff, if they believed the evidence; and refused a general charge in favor of the defendant, as requested in writing by him; to which charge and refusal, each, the defendant duly excepted.

The several rulings of the court on the evidence, as above stated, the charge given, and the refusal of the charge asked, are now assigned as error.

JOHN GAMBLE, for appellant.—The court certainly erred, either in admitting the evidence adduced by the plaintiff, or in rejecting the evidence offered by the defendant to identify the lot sold and conveyed. That the rejected evidence ought to have been admitted, see *Abbott v. Abbott*, 53 Maine, 356; *Johnston v. McDonnell*, 37 Texas, 595; *Dunn v. English*, 23 N. J. Law, 126; *Allen v. Holton*, 20 Pick. 463; *Rutherford v. Tracy*, 48 Mo. 325. But the deeds show on their face that only twenty feet front was conveyed.—*Minge v. Smith*, 1 Ala. 415; *Terrell v. Kirksey*, 14 Ala. 209; *Winston v. Browning*, 61 Ala. 80; 1 Bibb, 379; 2 Bibb, 270; 2 Greenl. Cruise, 335, note.

GARDNER & WILEY, *contra*, cited *Mason v. Pearson*, 2 Johns. 41; *Jackson v. Clark*, 7 Johns. 217; 2 Greenl. Cruise, 334-5, note 1.

SOMERVILLE, J.—The present action is one of ejectment, under the statute, the land claimed being described in the complaint as "Lot No. 2, of square No. 8, in the town of Rutledge," in the county of Crenshaw, and the State of Alabama. The deeds of conveyance introduced in support of the plaintiff's

[Sykes v. Shows.]

title, and shown to have been executed to him by the defendant in the early part of the year 1879, contain *the same general description* of the lot sued for, with the *additional* designation, "*being twenty feet in front, and running one hundred and ten feet back.*"

It is obvious that, upon the face of the deed, there is no ambiguity, or repugnancy of description. The dimensions of the entire lot appear to be only a rectangular area, of *twenty feet by one hundred and ten feet*. There is an ambiguity, however, or rather a repugnancy, which is made to appear by parol evidence introduced upon the trial, in aid of the true identification of the land. This evidence shows, without conflict, that lot number 2, as described in the complaint, is *thirty feet* in front, instead of *twenty feet* as stated in the deed, and runs back one hundred and ten feet as described; that the quantity or area intended to be sold, as shown by the actual measurement of the parties, was only *twenty feet* front on the *east* side; and that the plaintiff was placed in actual possession of this parcel, and had so continued for about four years prior to commencing the present action. The defendant's stable covered in part the *ten feet* front on the *west* side of the lot, running back its full depth, and defendant had remained in actual possession of this parcel since the day of sale, claiming ownership of it as he had for a long time before. It was objected at the trial, and is here insisted, that this parol evidence was inadmissible to explain the ambiguity disclosed; and that the area of the entire lot, which was *thirty feet* front, could not be shown to be limited or controlled by the latter clause of description, stated in the deed to be *twenty feet*.

We are of opinion that the court erred in excluding this evidence. The designation of the lot in controversy as "lot number 2" was a *general designation*, sufficiently certain only on the principle, that it could be rendered certain by parol identification. Without more, it could not be known what were the real dimensions of the lot. The designation by metes or distances was a *particular description*. The rule is, that where a general and a particular description are both used in the same deed, in reference to the same land, and they both can not stand together, because of repugnancy, the particular description will control, and the general one be rejected as *falsa demonstratio*.—Sedg. & Wait's Trial Land Titles, § 458; *Inge v. Garrett*, 38 Ind. 96; 1 Greenl. Ev. (Redf. Ed.), § 301, note 2.

It is true, that the particular written description does not show whether the twenty feet front of lot number two, which was sold to plaintiff by defendant, was on the *east* or *west* side of the lot. But this ambiguity was relieved by the parol proof that the plaintiff was placed in possession of the twenty feet

[Wolffe v. Minnis.]

on the *east* side, and has ever since occupied and claimed it under the deed. Where descriptions in deeds are ambiguous, or doubtful, and even void on their face for uncertainty, the courts often admit, in aid of the identification of the subject-matter, proof of the situation of the parties, and the circumstances surrounding them. This embraces the facts of ownership, possession, change of occupancy, and other circumstances showing the relation of the contracting parties to each other, and to the property at the time the negotiations transpired and the writing was executed. The intention of the parties is thus elicited, by showing the practical construction which they themselves placed upon their own contract.—*Chambers v. Ringstaff*, 69 Ala. 140; *Ellis v. Burden*, 1 Ala. 458; *Mead v. Parker* (115 Mass. 413), 15 Amer. Rep. 110; *Harley v. Brown*, 98 Mass. 545; 1 Greenl. Ev. (Red. Ed.), § 301, note 2.

The deed was properly admitted in evidence; the acknowledgment before the circuit clerk, as shown by his certificate, dispensed with the necessity of attesting witnesses, although one of the grantors could not write, and made her signature by *mark* only.—*Weil v. Pope*, 53 Ala. 585; Code, 1876, § 2146.

For the error of the court in giving the general charge requested by the plaintiff, and in refusing to give the charge requested by defendant, as well as the exclusion of the parol evidence offered by defendant, the judgment must be reversed, and the cause remanded.

Wolffe v. Minnis.

Action on Common Money Counts.

1. *Argument of counsel to jury.*—While great latitude must be allowed to counsel in addressing a jury, in the matter of drawing inferences from proven facts, facts must not be stated as facts, when there is no proof whatever of them, and any proof of them would not be legitimate evidence.

2. *Same; duty of court in restraining.*—It is the duty of the court to interfere, *ex mero motu*, and arrest counsel who go beyond the limits of legitimate argument; and when objection is duly interposed to the improper language used, the court should instruct the jury in plain terms, that the remarks are not legitimate argument, and must not be considered by them for any purpose. It is not enough that the counsel himself, on objection being made, withdraws his remarks, by saying "Oh, well, I'll take it back."

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

[Wolffe v. Minnis.]

This action was brought by John A. Minnis against Frederick Wolffe, to recover an alleged balance due on account of moneys deposited by plaintiff with the banking-house of Wolffe, Hertz & Co., of which the defendant was a partner. The complaint contained only the common money counts. The defendant pleaded, "in short by consent," the general issue, and a special plea averring that, on an accounting between plaintiff and defendant, a small balance was ascertained to be due to plaintiff, and was afterwards paid on his order; and issue was joined on these pleas. On the trial, as appears from the bill of exceptions, the plaintiff testified as a witness for himself, and stated, in substance, that he deposited with the defendant's said banking-house, between the spring of 1875 and November, 1880, all the warrants drawn in his favor by the Board of Revenue of Montgomery county, for salary and fees due him as judge of the City Court of Montgomery, amounting to about \$19,000, and had drawn out in checks, from time to time, up to July, 1881, about \$16,300; and he claimed that the balance was still due him. The defendant then introduced evidence tending to show that, in July, 1881, "plaintiff had drawn out by check all that was on deposit in his name with said banking-house, except the sum of \$1.44; and that subsequently, on being informed, in answer to inquiries, that said balance was to his credit, he drew out that amount by check to close the account." The plaintiff then testified, in rebuttal, "that after he had drawn said check for \$1.44, he called on defendant for a statement of his account, and for all his checks for examination, stating at the time that he wanted them to ascertain to whom he had been lending money, of which he kept no account, and to see if he could not collect some of his loaned money; that he found, on examination of the account, that the defendant had not given him credit for all of his warrants; that he had been economical, had boarded with his mother-in-law from December, 1874, to October, 1875, and had but little cause to spend money; and that he had the utmost confidence in the defendant's honesty and financial ability, and trusted him to keep the account correctly." One of the plaintiff's attorneys, in his concluding argument to the jury, said: "Judge Minnis, gentlemen, is a large-hearted, great-souled man, confiding and trusting. He is not one of those grasping men who keep a strict account of every cent they spend. If a poor widow should come to him, and tell him she was without bread, as quick as thought, he would run his hand into his pocket, and, pulling out a ten-dollar bill, would say to her, 'Here, take this, and go buy you a barrel of flour.'" The bill of exceptions states that "there was no evidence, other than as above stated, tending to show" the facts so stated by counsel. "The

[Wolffe v. Minnis.]

defendant's counsel called the attention of the court to these remarks, and objected to the same, upon the ground that there was no evidence in the cause to support said remarks; that the counsel was assuming facts to exist, which were not in evidence; and that said statement of facts would not have been legal evidence, if it had been offered as such. Thereupon, plaintiff's counsel said, '*Oh, well, I'll take it back.*' The defendant's counsel said to the court, 'The defendant insists on his objection.' The court said nothing—did not withdraw said remarks from the jury, nor instruct them not to consider the same, and did not take any action in reference thereto; and the defendant excepted thereto. The defendant did not expressly ask the court to instruct the jury not to consider the same, and did not expressly ask the court to take any action in reference thereto."

It is now assigned as error by the defendant below, that the court erred in allowing plaintiff's counsel to make said remarks to the jury, and in not withdrawing said remarks from the jury, and in not instructing the jury that they must not consider said remarks for any purpose.

RICE & WILEY, and D. CLOPTON, for appellant, cited *Scripps v. Reilly*, 35 Mich. 371, or 24 Amer. Rep. 583; *Darby v. Ouseley*, 36 Eng. L. & Eq. 518; *Bullock v. Smith*, 15 Geo. 395; *Berry v. The State*, 10 Geo. 511; *Mitchum v. The State*, 11 Geo. 615; *Dickerson v. Burke*, 25 Geo. 225; *Read v. State*, 2 Indiana, 438; *Tucker v. Hennicker*, 41 N. H. 317; *Martin v. Omdorff*, 22 Iowa, 504; 5 Jones, N. C. 224; *Fry v. Bennett*, 3 Bosw. 200; *Mitchell v. Borden*, 8 Wendell, 570; *Willis v. Forrest*, 2 Duer, 310; *Randall v. Brigham*, 7 Wallace, 540; *State v. Reilly*, 4 Mo. App. 392; *State v. Degonia*, 69 Mo. 485; *Long v. The State*, 56 Indiana, 182; *Com. v. Scott*, 123 Mass.; *Cobb v. Cobb*, 79 N. C. 589; *Brown v. Swineford*, 44 Wisc. 282; *Cross v. The State*, 68 Ala. 476; *Sullivan v. The State*, 66 Ala. 51; *McAdory v. The State*, 62 Ala. 154.

WATTS & SONS, and TROY & TOMPKINS, *contra*.—The remarks objected to were not outside the limits of legitimate argument. The evidence certainly tended to show that the plaintiff was confiding and trusting in a very high degree—depositing large sums of money in defendant's bank, keeping no accounts, and intrusting every thing to the honesty and fidelity of the defendant and his clerks; lending out money, and not knowing the sums loaned, or the names of the borrowers. The objection was to the remarks as a whole; and if any part was free from objection, the court might have overruled the objection entirely. But the record shows that the court did not overrule the objection, nor did it overrule any motion

[Wolffe v. Minnis.]

or objection distinctly made by the defendant; and the remarks objected to having been withdrawn by counsel, there was no necessity for the interference of the court, in the absence of a request for instructions on the part of the defendant. Under the rule laid down in the case of *Cross v. The State* (68 Ala. 476), which shows the correct practice, the record does not contain enough to put the court in error.

STONE, J.—The remarks made by counsel in this cause, and objected to, were not only not supported by any evidence, but they were impertinent to the issue the jury were sworn to try. Any offer to make proof of the matters stated, would have been ruled out as illegal. "Large-hearted, great-souled, confiding, trusting," when used as attributes of character, are facts; and are provable as other traits of character are, when they become a material subject of inquiry, if they ever can become so. They were not material in this case. If pertinent facts had been in evidence, tending to show the plaintiff possessed these traits of character, we will not say counsel would have been beyond bounds, if he had contended, as an inferential fact, that his client possessed such traits. Much latitude must be allowed to counsel, in the matter of drawing inferences from proven facts. We would not interdict free advocacy. Facts, however, must not be stated, as facts, of which there is not only no proof, but of which there can legitimately be no proof.

We think the language complained of in this case should not have been indulged; and coming as it did from able, eminent counsel, it was well calculated to exert an improper influence on the minds of the jurors. The court might, and probably should, have arrested it *ex mero motu*. It is one of the highest judicial functions, to see the law impartially administered, and to prevent, as far as possible, all improper, extraneous influences from finding their way into the jury-box. And when opposing counsel objected to the improper language employed, and called the attention of the court to it, it was not enough that offending counsel replied, "Oh, well, I'll take it back." Such remark cannot efface the impression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument, and that they should not consider any thing, thus said, in their deliberations. Nothing short of a prompt, emphatic disapproval of such line of argument, and that from the court itself, can avert the probable mischief. *Sullivan v. The State*, 66 Ala. 48; *Cross v. The State*, 68 Ala. 476.

Reversed and remanded.

[Roney v. Moss.]

Roney v. Moss.*Bill in Equity for Specific Execution of Defective Mortgage.*

1. *Specific execution of imperfect instruments.*—When a written instrument, intended as a conveyance, is defective in some particular essential to pass the legal title,—as the attestation of a subscribing witness, or a proper acknowledgment,—a court of equity will regard it as an agreement to convey, and will decree a specific execution of it, if the person executing it was *sui juris*; but, to authorize such decree, the instrument must be founded on a valuable consideration, and must be strictly equitable.

2. *Same; consideration and recitals of mortgage.*—When the instrument, a specific execution of which is sought, is in the form of a mortgage to secure the payment of a debt particularly described, its recitals are *prima facie* evidence of the existence of the debt, and cast on the mortgagor the *onus* of disproving them; but, the evidence in this case clearly showing that the debt had been in fact paid, the presumption is rebutted, and a specific execution properly refused.

3. *Presumption arising from failure of proof.*—When a party has the means and opportunity to prove a material fact, and fails or neglects to prove it, it is a fair and just presumption that the fact does not exist.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 28th June, 1881, by John E. Roney, against James Moss and Wyatt S. Oates; and sought a divestiture of the legal title to a tract of land out of said Moss, and an injunction of an action at law which he had brought against the complainant to recover the possession. The tract of land contained one hundred and sixty acres, and was sold and conveyed to the complainant by said Wyatt S. Oates, by deed dated the 23d September, 1878, on the consideration of \$320 in hand paid; and the complainant was in possession, under his purchase, when the bill was filed. Said Oates was in possession of the land at the time of his sale and conveyance to the complainant, claiming and holding under an instrument in the form of a mortgage, executed to him by said Moss and wife, which contained a power of sale; and default having been made in the payment of the secured debt as recited, he sold the land under the power, and became himself the purchaser at the sale. This instrument, a copy of which was made an exhibit to the bill, was dated the 16th January, 1877, and was signed by said James Moss and his wife, each signing by mark only. It purported to be given to secure the payment of a promissory note for \$342.26, of even date with

[Roney v. Moss.]

the mortgage, which was signed by said Moss and wife, each signing by mark only, and a copy of which was set out in the mortgage. Neither the mortgage nor the note had any attesting witnesses, but the certificate of a justice of the peace was appended to the mortgage, in these words: "I, J. J. Head, N. P.," &c., "hereby certify, that J. and Serena Moss, whose names are signed to the foregoing conveyance, and who are known to me, executed the same voluntarily, before me, on the day the same bears date." The bill alleged that this instrument was intended by the parties as a valid mortgage, and was delivered and accepted as a complete, executed conveyance; that it was executed and acknowledged before the justice of the peace, on the day of its date, but was defective as a conveyance, on account of the insufficiency of his certificate, through mistake or ignorance on his part; and that the defect was not discovered until after the lands had been sold under the power contained in the instrument, after Moss had delivered possession to Oates as the purchaser at the sale, and after Oates had sold and conveyed to the complainant. The action at law, an injunction of which was sought, was commenced in September, 1881.

An answer to the bill was filed by Moss, denying the validity of the mortgage, alleging that it was without consideration, and that it was void both at law and in equity. He alleged that the land was his homestead, having been entered under the Homestead Acts of Congress, and that the instrument was void, under these acts, because he had not completed the payments of the purchase-money, and had no legal title; and that it was void as a conveyance of his homestead, because it was not executed as required by the statute. He denied that he owed any debt to the mortgagee, as recited, and charged fraud and usury in the transaction; and he demurred to the bill, for want of equity.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

OATES & COWAN, and TROY & TOMPKINS, for appellant.—A court of equity has undoubted power to aid an imperfect attestation, and compel a conveyance of the legal estate as intended by the defective deed, treating it as an executory agreement to convey.—*Goodlett v. Hansell*, 66 Ala. 151; *Jenkins v. Harrison*, 66 Ala. 345; *Wadsworth v. Wendell*, 5 Johns. Ch. 230; *Morse v. Faulkner*, 1 Anstr. 14; *Barr v. Hatch*, 3 Ohio, 538; *Jennings v. Moore*, 2 Vern. 609; *Varick v. Edwards*, 1 Hoff. Ch. 381. Under these authorities, if no question of homestead were involved, the court would not hesitate to decree a divestiture of the legal title to the land. Though the mortgage is

[Roney v. Moss.]

defective on its face, the defective certificate amounting only to an attestation by one witness (*Merritt v. Phenix*, 48 Ala. 87); yet the proof shows that the parties complied with all the requisitions of the law, and the only defect was caused by the ignorance or mistake of the officer; and the court will not allow this to operate a fraud on innocent parties.—*Burrell v. Hanrick*, 42 Ala. 60; 30 Ala. 100; 29 Ala. 346. But the subsequent abandonment of the premises by Moss, when he delivered possession to Oates, removes this obstacle, and shows that no homestead right is involved.—*Gee v. Moore*, 14 Cal. 472; *Allison v. Shilling*, 27 Texas, 450; *Brewer v. Wall*, 23 Texas, 585; *Heard v. Downer*, 47 Geo. 629; *Benedict v. Webb*, 57 Geo. 348; *Stewart v. Mackey*, 16 Texas, 56; *Jordan v. Goodman*, 19 Texas, 273; *Hewitt v. Templeton*, 48 Ill. 367; *Hall v. Fullerton*, 69 *Ib.* 448; *Winslow v. Noble*, 101 *Ib.* 194.

J. A. CLENDENIN, *contra*. (No brief on file.)

BRICKELL, C. J.—It is a familiar doctrine of a court of equity, that an instrument in writing, intended as a conveyance of lands, wanting in some essential element to pass the legal estate,—as the attestation of a subscribing witness, or an acknowledgment of execution before an officer having authority to take and certify it, or a defective acknowledgment,—will be regarded as an agreement to convey, and performance of it will be enforced.—*Goodlett v. Hansell*, 66 Ala. 151; *Jenkins v. Harrison*, *Ib.* 345. It is scarcely necessary to say, that we refer to instruments executed by persons who are *sui juris*, and not to instruments executed by married women, not conforming to statutes enabling them to convey lands. The court will not decree specific performance of the instrument, unless it is strictly equitable; nor unless it is founded upon a valuable consideration. The instrument stands upon the footing of an executory contract to convey; and if it appears to have been made without consideration, the court will not decree that it be carried into effect.—*Hanson v. Michelson*, 19 Wisc. 498.

The instrument of which appellant claims performance was intended as a mortgage to secure a debt which is particularly described. The debt forms the consideration which must support it, and, if there be no debt, specific performance of it can not be decreed justly and equitably. The recital of the debt in the mortgage, and the promissory note embodied in it, are *prima facie* evidence of the existence of the debt, casting upon the mortgagor the burden of disproving its existence and its consideration. An examination of the evidence leads us to the conclusion, that the presumption arising from the recital of the mortgage, and from the making of the promissory note, is

[Foster v. Napier.]

clearly repelled, and that there was really no debt due or owing from the mortgagor to the mortgagee when the instrument was executed. The antecedent debt to Ephraim Oates, the assignor of the mortgagee, which forms a large part of the amount for which the note was given to the mortgagee, is shown to have been fully paid before the note was assigned. If there was any other consideration for the note, the mortgagee must have known of what it consisted, and had the power of proving it. The evidence of the mortgagor is clear and pointed, that there was no other consideration, and that he had no transaction with the mortgagee, from which a debt could originate. When a party, having the means and opportunity to prove a fact, fails or neglects to offer evidence of it, the presumption is fair and just that it does not exist.

We do not regard it as necessary to consider any other question the case is supposed to present, for upon this clear ground, that there is no consideration for the instrument, specific performance of it was properly refused. Let the decree be affirmed.

Foster v. Napier.

Action on Statutory Detinue Bond.

1. *Transcript, and costs thereof.*—The court complains of the confused state of the transcript in this case, and orders that no costs shall be allowed for it.

2. *Plea of tender.*—When a tender is pleaded, accompanied with the payment of the money into court, and the plea is sustained, the defendant is entitled to a verdict, but the money deposited becomes the property of the plaintiff.

3. *Payment of mortgage debt, as defense to action founded on mortgage.* When the mortgagee of personal property brings detinue, or the statutory action for the recovery of specific chattels, and the plea of payment is interposed, the inquiry is limited to the mortgage debt, and other debts or matters of account between the parties are not within the issue. If any part of the mortgage debt remains unpaid, though the mortgagee may owe the mortgagor another debt of equal or greater amount, the plea is not sustained, and the plaintiff is entitled to recover; and if the mortgage debt is fully paid, the defendant is entitled to a verdict, without regard to other debts or demands; consequently, the judgment on such issue is conclusive only as to the mortgage debt.

4. *Attorney's fees, costs, travelling expenses, &c., as damages.*—In an action on a statutory bond given by the plaintiff in detinue (Code, § 2942), attorney's fees, and costs incurred in that suit (if not previously recovered), as well as any damages actually sustained from the seizure and detention of the property, are legitimate subjects of recovery; but loss of time, and hotel bills paid, while engaged in procuring sureties on the replevin bond, or in attendance on the trial, are too remote and variable.

[Foster v. Napier.]

5. *Parol evidence as to consideration of writing.*—A landlord having procured a merchant to make statutory advances to one of his tenants, from whom a crop-lien note was taken by the merchant, and having executed to the merchant a writing in these words, "I hereby agree and obligate [myself] to bear half the loss, provided the crop does not pay said F. [merchant] five hundred dollars, for furnishing J. and his hands during the year 1879;" parol evidence is admissible, to show that the consideration of the writing was the agreement and promise of F. to furnish supplies to said J. to the amount of five hundred dollars.

6. *Statute of frauds, as to promise to answer for debt or default of another.*—Such writing is itself void under the statute of frauds (Code, § 2121), being a promise to answer for the debt or default of another, and not expressing on its face the consideration on which it was founded.

7. *Contract between landlord and merchant furnishing supplies to tenants; respective rights and liens under.*—If a merchant agrees and promises, at the instance of the landlord, to make statutory advances to his tenants to a specified amount; and the landlord, in consideration thereof, agrees to be responsible for the debt, and transfers his rent contracts as collateral security for its payment; the merchant can not enforce this obligation, when it is shown that he failed to furnish supplies to the full amount specified; but, if he complied fully with his undertaking, he would be entitled to payment out of the crops, in preference to the landlord's claim for rents.

APPEAL from the Circuit Court of Bullock.
Tried before the Hon. H. D. CLAYTON.

WATTS & SON, for appellant.

NORMAN & WILSON, *contra*.

STONE, J.—We regret to find the transcript in this case in so confused a state, that we feel it our duty to complain of it. In the make-up of records, order should be observed, and subjects should be set forth separately and distinctly; and a caption, or marginal note, should be employed, to separate and distinguish the several documents or papers made parts of it.

The present suit is founded on a bond, executed by the appellant as plaintiff, in the institution of a statutory action for the recovery of personal property in specie.—Code of 1876, § 2942. That action was commenced by Foster against Napier, January 16th, 1880, and terminated in a verdict and judgment for defendant, September 9th, 1880. The suit was for the recovery of three mules and a wagon; and plaintiff claimed title under two mortgages executed by Napier, one bearing date in April, 1878, and the other January 1st, 1879. Each of these mortgages was given to secure advances made or to be made by Foster to Napier, to enable the latter to make a crop during the respective years. The defense to the action was made on two pleas: the general issue, and a special plea, averring payment of the debt secured by the mortgages, except one hun-

[Foster v. Napier.]

dred and seventy-five dollars, which the plea averred had been tendered to plaintiff before action brought. With this plea, the defendant brought the money into court. The issues being thus formed, if the defendant proved the truth of his second plea, he was entitled to a verdict, but the money tendered would become the property of the plaintiff.—1 Brick. Dig. 574, §§ 45, 46; *Slaughter v. Swift*, 67 Ala. 494. In such case, the issue is confined to the question of the debt, or its payment, for which the mortgage was given as security. It matters not if the defendant owes the plaintiff other debts, not secured by the mortgage. If the debt the mortgage was given to secure has been paid, this was a complete answer to the suit on the mortgage title. So, if any part of the mortgage debt remained unpaid, it was no defense to the action, that the mortgagee owes the mortgagor on other account. This would furnish a subject for a cross-action, or, to some suits, a successful plea of set-off. It is not payment; and hence, is not a defense to an action of detinue, based on a mortgage title. The defense set up in that suit, and the verdict and judgment thereon, taking into the account the pleadings and charge of the court on the trial, settled conclusively that Napier did not, at the commencement of that suit, owe Foster exceeding one hundred and seventy-five dollars on the debts secured by the mortgages, and that, before suit brought, he had tendered that sum, and had it in court for Foster. The record does not inform us what became of this money; but, as we have said, it became Foster's. That suit, however, settled no other matter of dealings between them, for the obvious reason, that any other matter of dealings or account between them would have been irrelevant to the issue, and could not have been the subject of proof or finding. It should, perhaps, be stated, that inasmuch as the detinue suit was tried before February 8th, 1881, the act to amend section 2944 of the Code, approved on that day, could exert no influence in its trial. *Sess. Acts*, 39.

As we have said, the present action is brought on the detinue bond, executed in suing out the writ in the case mentioned above. The plaintiff, against the objection of defendant, was allowed to prove his loss of time, and hotel bills paid, first, in procuring sureties on his replevin bond, and, second, in attending the trial of the case. In this, the Circuit Court erred. Such damages are too remote and variable.—*Bolling v. Tate*, 65 Ala. 417; *Renfro v. Hughes*, 69 Ala. 581. Attorney's fees, and costs incurred in the former suit (if the latter have not been previously recovered), as well as any damage actually sustained by the seizure and detention of the chattels, are legitimate subjects of recovery.

The main defense relied on in this case was set-off. The plea

[Foster v. Napier.]

setting up this defense rested on three grounds: First, that Napier owed Foster a balance on account for advances secured by the mortgages from the former to the latter, mentioned above. As to this claim, the verdict and judgment in the detinue suit was and is a complete answer, to the extent that said claim is made up of advances made before that suit was brought. As to these, the former judgment was a former recovery. Second, the claim set up by Foster, growing out of advances made to Sidney Jones and hands. The facts connected with this question are as follows: As we have said above, on the 1st January, 1879, Napier executed to Foster a mortgage to secure advances for the year 1879. The mortgage was made to secure a note for six hundred and seventy-five dollars, which purported on its face to be a crop-lien note for advances. It contained a clause waiving exemptions. The mortgage also provided for, and secured future advances. The mortgage conveyed to Foster, as security for such indebtedness, the entire crop raised by Napier in 1879 and 1880, including all rents and incomes, with rents due by P. Youngblood, three mules (two bay mare mules and one bay horse mule), one steam-engine, gin and screw, entire stock of cattle and hogs, and one wagon. The three mules and wagon were the subject of the action of detinue. On the 1st day of February, 1879, Sidney Jones and hands executed a note to Napier of five hundred dollars, for land rent for that year. On the 31st day of January, 1879, Sidney Jones and hands executed to Foster a crop-lien note for advances in the sum of five hundred dollars, with waiver of exemptions. On the same day, to secure said note, and also to secure any future advances to be made to them, they conveyed to Foster their crop to be grown, one mule, cattle and hogs, and farming tools; this, by mortgage. Napier executed a paper, without date, of which the following is copy: "I hereby agree and obligate to bear half the loss, provided the crop does not pay S. J. Foster five hundred dollars, for furnishing Sidney Jones and his hands for the year 1879;" signed, "*G. C. Napier.*" These are the paper contracts. There is no proof that Foster obtained from Jones and hands, or for their debt to him for advances, any part of the crop grown by them in 1879. On the contrary, the proof is that their crop for that year was received, used and converted by Napier, on his claim for rents, and possibly for advances, as after shown.

The record abounds in conflicting testimony. Foster testified, that the note and mortgage executed by Jones and hands to him, the rent note to Napier, and Napier's conditional obligation to bear half the loss, copied above, though differing somewhat in dates, were all executed at one and the same time, constituted one transaction, and were part and parcel of an

[Foster v. Napier.]

application by Napier to have Foster make advances to Jones and hands, to enable them to make a crop that year; and that he, Foster, agreed to make the advances in consideration and in consequence of the writings thus executed. And he, Foster, testified that, as part of the agreement, Napier delivered to him, as collateral security for the performance of the contract by Jones and hands, the rent note executed by the latter to him, Napier. Napier, while he did not deny his agency in obtaining the agreement of Foster to advance to Jones and hands, testified that the papers were not executed at once, but that his obligation to bear half the loss was executed some time afterwards. He also testified, that he did not deliver to Foster the Jones rent note as collateral to his obligation to bear half the loss, but as collateral for the advances made by Foster to him, Napier. Another irreconcilable conflict in the testimony is the following: Napier testified that, as consideration on which he entered into the obligation to sustain half the loss Foster might suffer from advances made and to be made to Jones and hands, he, Foster, agreed to furnish to Jones and hands five hundred dollars, in such commodities as the statute declares may be the consideration of a crop lien; and that he stopped short of furnishing the five hundred dollars of such articles, before the sum was reached, and before the crop was made.—See Code of 1876, § 3286. He testified, that he, Napier, had been forced, on account of Foster's failure, to furnish the needed supplies. Foster swore that he had not agreed to furnish any particular amount, but that he had said he would not go beyond five hundred dollars in value. There were many other discrepancies.

It was objected for defendant, Foster, that the testimony of Napier, that Foster agreed to furnish supplies to the extent of five hundred dollars, varied the terms of the written contract, and was therefore illegal. We do not so understand it. The writings do not purport to set out the consideration on which Napier's obligation was based. They do not purport to set out the whole contract. The testimony tended to prove the consideration on which the written promise was given; or, if you please, an independent stipulation, not attempted to be reduced to writing, and in no way varying, or contradicting the terms of the writing.—1 Brick. Dig. 859, §§ 787 *et seq.*; 1 Greenl. Ev. §§ 284 *a*, 304; 2 Whart. Ev. §§ 927, 1015.

The above is an exception to the rule, where the writing is, on its face, a valid contract. But the obligation executed by Napier, binding himself to make good half the loss Foster might sustain, is invalid under our statute of frauds. It was, at most, a promise to answer for the debt of another, which, though in writing, does not express any consideration. Such

[Foster v. Napier.]

promises are not binding.—2 Brick. Dig. 30, 31, §§ 222, 230; Code of 1876, § 2121.

There is another phase of this question. It will be remembered that, according to the testimony of Foster, the rent contract signed by Jones and hands, payable to Napier, was placed by the latter in the hands of Foster, as collateral security for the advances he was to make to Jones and hands. Napier denied this, and testified it was placed there pursuant to the terms of his mortgage to Foster, and as security on his individual debt. If Foster's account of this transaction is the true one, and the deposit of the rent contract was as security of the debt from Jones and hands, then it will become necessary for the jury to inquire, whether it was one of the terms of the contract that Foster was to furnish Jones and hands with supplies of the kinds mentioned in section 3286 of the Code, to the extent of five hundred dollars, and whether Foster has kept or violated that stipulation. If it be true that Foster's agreement was to furnish five hundred dollars worth of supplies, and the rent contract was placed in his hands on that condition, and as security for its payment; and if it be further true that Foster failed and refused to furnish that amount of supplies of the classes stipulated, then that failure absolved Napier from all obligation to pay for such advances, or any part of them, or to surrender his rent claim to Foster. It would present the familiar case of a claim by Foster, under an executory contract, the dependent stipulations of which he had first broken. On this hypothesis, Foster could claim nothing of Napier, for cotton received by the latter, and applied to rents and indebtedness to himself for advances. So, if the note was placed with Foster by Napier, as collateral security for advances made, or to be made to him, then Foster can claim nothing in this suit on that account. On the other hand, if Foster's version be the true one, that he was not bound to furnish to Jones and hands any specified amount of advances, and if the note was placed in his hands as collateral security for the debt from Jones and hands, then, to the extent Napier received and converted the rents, he would be liable to Foster for so much money had and received, to the extent of the debt to Foster, to secure the payment of which he deposited the note as collateral. Such agreement, if made, would have the effect of securing to Foster a prior right to have his claim paid out of the rents, before the claim of Napier would attach.

The third ground of set-off grew out of a transaction with one Green Adair. Adair, we infer, was a tenant of Napier. On the 6th day of February, 1878, Adair executed to Foster a crop-lien note for the sum of two hundred and twenty-five dollars, with waiver of exemptions. At the same time, he

[Burke v. The State.]

executed a mortgage to secure its payment, conveying crops to be made in 1878 and 1879, and his stock of cattle and hogs. Indorsed on this mortgage, as the language imports, is this agreement: "I hereby relinquish my entire rents due me, in favor of the above mortgage, until it is paid;" signed "*G. C. Napier*." There was a later note and mortgage, for a similar amount, conveying the same property, and one mule and tools. There was no waiver or relinquishment by Napier, as to this note and mortgage. The account rendered against Adair, in favor of Foster, was continuous, and amounted to near five hundred dollars. It has credit for nine bales of cotton sold, amounting to three hundred and thirty-eight dollars, leaving unpaid one hundred and fifty-six dollars. It would seem there must have been a surrender of cotton, exceeding in value the amount of the first note and mortgage, and that therefore Foster has no claim on this account. The charge of the court, as to this claim, is free from error.

Plaintiff's charge No. 2 is faulty, in that it assumes as fact Napier's statement, that Foster agreed to furnish supplies to Jones and hands amounting to five hundred dollars. The testimony on this question was in conflict, and should have been left to the jury.

What we have said will furnish a guide for another trial, and we need not comment on the other charges.

Reversed and remanded, at the costs of the appellee; but without any costs to the clerk of the Circuit Court, for the transcript sent up.

Burke v. The State.

Indictment for Enticing away Laborer.

1. *Confession of judgment, as release of errors.*—In a criminal case, the confession of a judgment with sureties for the fine and costs, as authorized by statute (Code, §§ 4454-55), is not a release of errors, and does not prejudice the right to revise the judgment by appeal or writ of error; though a different rule is declared by statute (*Ib.* § 3945) in civil cases.

2. *Conviction of attempt to commit offense charged.*—When the evidence fails to show consummation of the offense charged, the defendant may nevertheless be convicted of an attempt to commit it (Code, § 4904); consequently, in such case, the court may refuse to instruct the jury that, if they believe the evidence, they must acquit the defendant.

FROM the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

[Burke v. The State.]

The indictment in this case charged, in a single count, "that Monroe Burke did knowingly interfere with, hire, employ, entice away, or induce Lou Smith, a laborer or servant of Simeon H. Reese, who had contracted in writing to serve said Reese a given time, not exceeding one year, to leave the service of said Reese before the expiration of the time so contracted for, without the consent of said Reese," &c. On the trial, as the bill of exceptions shows, issue being joined on the plea of not guilty, "the State proved that, at a late hour in the night, the defendant, who resided five miles distant, went with a wagon and team to the house occupied by Lou Smith, a servant who had contracted in writing with one S. H. Reese, and was then in his employment, under said contract, as a farm laborer on the plantation of said Reese in said county,"—here setting out the contract, which was dated January 11th, 1882; "that defendant took said Lou Smith, with her household effects, into said wagon, and drove a short distance, but not off the premises of said Reese, by whom he was intercepted, and forced to return and unload said wagon, at and into the house from which he had so taken said Lou Smith; and that defendant had been previously notified that said Lou Smith was serving said Reese under said written contract. This being all the evidence, the defendant requested the court, in writing, to charge the jury, that, if they believed the evidence, they will find the defendant not guilty." The court refused this charge, and the defendant excepted to its refusal.

The verdict and judgment are in these words: "Thereupon, came a jury," &c., "who, upon their oaths, say, that they find the defendant guilty of an attempt to entice away a servant under written contract with his employer, and assess a fine of *one cent*. Thereupon, came the defendant into open court, and with him James A. Burke, who each, jointly and severally, confess a judgment to the State of Alabama, for the use of Barbour county, in the sum of one cent, the amount of said fine, and also the costs, and consent that execution may issue. It is therefore considered," &c.

H. C. TOMPKINS, Attorney-General, for the State, cited Code, §§ 3945, 4904; *Wolf v. The State*, 41 Ala. 412; Bishop on Stat. Crimes, § 138.

SOMERVILLE, J.—The statute which provides that a "confession of judgment is in law a release of errors" (Code, 1876, § 3945), has never been construed to have any application to cases strictly criminal. The context of the Code, as well as the reason upon which this particular statute is based, shows a legislative intention to confine it to cases other than such as are

[Owens v. The State.]

criminal.--*McNeil v. The State*, 71 Ala. 71; *Murphree v. Whitley*, 70 Ala. 554. It seems to be clearly contemplated by the statute, relating to the subject of penal imprisonment, and sentences to hard labor in default of payment or security by defendants, that a judgment may be confessed for fine and costs, with sufficient sureties, without any prejudice to the right of appeal, or writ of error to the appellate court.—Code, 1876, §§ 4454–4455; *Burke v. The State*, 71 Ala. 377.

The action of the court was free from error, in refusing to give the general charge requested by the defendant, that, if the jury believed the evidence, they should find the defendant not guilty. This charge clearly ignored, as well as contravened the principle, that, under an indictment for the offense charged, the defendant could lawfully be convicted of an *attempt* to commit the same offense. The statute so expressly provides, and such is the established course of our criminal procedure. Code, 1876, § 4904; *Wolf's case*, 41 Ala. 412; *Edmonds v. The State*, 70 Ala. 8.

There is no error in the record, and the judgment is affirmed.

Owens v. The State.

Indictment for Trespass after Warning.

1. *Declarations of third person; admissibility as evidence.*—The declarations of the defendant's brother, made to the prosecutor a few days before the commission of the alleged trespass, but not in the defendant's presence, nor shown to have been authorized by him, or even to have been communicated to him, are *res inter alios actæ*, and not admissible as evidence against the defendant; and neither the relationship between the two brothers, nor the fact that they were in company when the alleged trespass was committed, is sufficient to bring such declarations within the principle which governs the admissibility of the acts and declarations of conspirators as evidence against each other.

2. *Description of premises in indictment, and in notice.*—In a prosecution for trespass after warning (Code, § 4419), it is not necessary that the premises should be particularly described in the indictment; nor is it necessary that they should be particularly described in the notice or warning given to the defendant.

3. *Sufficiency of notice, or warning.*—Warning, as the term is used in the statute, implies actual notice, brought home to the party sought to be charged, and constructive notice (as, by written or printed notices posted on or near the premises, or knowledge of facts sufficient to put a party on inquiry) is not sufficient; but notice may be established by circumstantial evidence, and notoriety in the neighborhood, though not conclusive, is admissible for the consideration of the jury.

4. *Continuous act, not ground for election.*—A single entry on the premises, though followed by several acts as the defendant moved about,

[Owens v. The State.]

or was seen at different places, is but a single trespass, and presents no ground for compelling an election by the prosecution.

5. *Legal cause or excuse, as defense; burden of proof as to.*—"Legal cause, or lawful excuse" for the alleged trespass, is defensive matter, which the prosecution is not required to negative, but which must be affirmatively proved by the defendant, unless the testimony which proves the act also proves the excuse.

FROM the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case charged, that the defendant, Brock Owens, "without legal cause, or good excuse, did enter on the premises of Gilbert McCall, after having been warned, within the six months preceding, not to do so; against the peace," &c. The cause was tried on issue joined on the plea of not guilty. On the trial, as the bill of exceptions states, said McCall was introduced as a witness for the prosecution, and testified, in substance, that he owned a large body of land containing about one thousand acres, situated on Pea River, partly in Barbour, and partly in Pike county, all of which was in the swamp and woods, never having been cleared or inclosed; that he and the several owners of the other swamp lands, comprising several thousand acres, posted their lands in December, 1882, by notices to which their names were jointly signed, and which were posted up at three places—"one at Bass' Mill, which was about three miles from the place of the alleged trespass; one on the Pike county end of Hobdy's Bridge, and one on the Barbour end of said bridge, which was on a public road, and about one-fourth of a mile from the place of said alleged trespass;" and that the notices were in the following form: "*Warning.* All persons are hereby warned not to trespass on any portion of our respective premises situated in Pike or Barbour county, Alabama. All violators, after this notice, will be proceeded against under section 4419 of the Code of Alabama." The defendant moved to exclude this notice, or warning, from the jury as evidence, "because it was vague and uncertain, and described no particular land or premises;" and he duly excepted to the overruling of his motion. There was no positive proof that the defendant had actual notice of this warning as posted, but there was evidence tending to charge him with notice; and it was shown that he was born and raised in the neighborhood, and lived about three miles from the place of the trespass.

Said McCall testified, "that within six months after said notices had been posted, to-wit, about February 12th, 1883, one Milton J. Owens, the brother of the defendant, and several other persons, the defendant not being with them, came to his house, and notified him that they, said crowd of persons then present, would go into the swamp next day, and upon his land,

[Owens v. The State.]

for the purpose of hunting wild hogs; to which witness replied, *'You can't go on my land with my consent.'*" To each part of this evidence, as to the declarations of said Milton J. Owens, and as to the reply of the witness, the defendant objected, "because he was not present at the time, and the same was illegal and irrelevant;" and he reserved exceptions to the admission of the evidence. "There was evidence tending to show that, two or three days after said interview between said M. J. Owens and others and said McCall, the defendant, said M. J. Owens and several others were together in said swamp, on said McCall's land, engaged in hunting wild hogs;" and one Cochran, a witness for the prosecution, "testified that, on the 12th, 13th, or 14th February, 1883, he saw the defendant, with said M. J. Owens and several other persons, in the swamp on said McCall's land," and that the defendant then had a tame hog on his shoulder. The defendant then introduced several witnesses, "whose testimony tended to prove that, at the time said alleged trespass was committed, the defendant had tame hogs in said swamp on McCall's land; that he was then on said land for the sole and honest purpose of taking and carrying off his own hog; that the hog caught was his, and that no one else ever asserted any ownership to it, though the fact of his taking it was generally known in the neighborhood, and was known to said McCall." On cross-examination of one of the defendant's witnesses, "the solicitor asked to be permitted to prove by him that, on the same day, after the alleged trespass, he saw the defendant on said McCall's land, at a different place, but near the same place; and stated, that he did not elect to proceed for this second trespass, but desired to prove it for the purpose of showing that the defendant knew where said McCall's land was." The court permitted the solicitor, against the objection of the defendant, "to prove such second trespass, and attendant circumstances;" and to the admission of this evidence the defendant duly excepted. There were several other exceptions reserved to the rulings of the court in the admission of evidence, but they are not deemed material.

"The court charged the jury, of its own motion, among other things, that it was not necessary for McCall's land to have been described, either by metes and bounds, or by numbers, in the notice alleged to have been posted by him; that if the defendant, from all the facts and circumstances in evidence, was in possession of such information as to the notice and the particular land which all persons were warned not to trespass upon, as would have put a reasonable man on inquiry, which inquiry, if followed up, would have led the defendant to a knowledge of what land all persons were warned not to trespass upon, then the defendant, in law, had notice of the particular land

[Owens v. The State.]

which he was warned not to go upon, and had a sufficient warning." The court charged the jury also, on the request of the solicitor, as follows: "If the defendant knew where said McCall lived, and had a general knowledge of his land, and could easily have found out, by inquiry, where said land was, it was his duty to have done so, and he can not be excused on the ground that he did not know where McCall's lands were; and in ascertaining whether he did know, or could easily have ascertained where said McCall's lands were situated, the jury may look to any evidence showing how long he and McCall have lived where they resided at the time of the alleged offense, and how far they resided from each other, with all the other evidence in the case." To each of these charges the defendant excepted.

The defendant requested the following charge, with others: "The State must show by the whole evidence, beyond a reasonable doubt, 1st, that the defendant had been warned, within the six months next preceding the time that the State elected to proceed against the defendant, not to trespass upon McCall's land; 2d, that the defendant knowingly entered upon said McCall's land; and, 3d, that he entered upon said McCall's land without a legal cause, or good excuse." The court refused this charge, and the defendant excepted to its refusal.

H. D. CLAYTON, Jr., for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The declarations of Milton J. Owens, made to McCall, the prosecutor, a few days before the alleged trespass, should not have been received. The defendant was not present, and it is not shown that he authorized them to be made, nor even that he was afterwards informed of the interview. Possibility, or even probability, that brothers thus circumstanced would act in concert, or that one would communicate to the other what had taken place, furnishes too uncertain a predicate for the admission of testimony, tending, at most, to prove conduct or conversation of persons, who are strangers to the record. They fall within the category of *res inter alios actæ*. Nor does the fact that the two were in company when the trespass was committed, a few days afterwards, prove that a conspiracy had been formed before the conversation was had, so as to legalize the evidence, or bring it within the principle that co-conspirators are responsible for the acts of each other.

2. The offense charged in this case is trespass after warning. Code of 1876, § 4419. It is objected, that the indictment is insufficient, in failing to describe the premises intended to be

[Owens v. The State.]

covered by the warning; and that the warning, or notice, is defective for the same reason. They conform to the rule laid down in *Watson v. The State*, 63 Ala. 19, and must be adjudged sufficient.

3. Warning implies notice; notice brought home to the knowledge of the party to be affected by it. The notice relied on in this case, consisted of written warnings, posted at three public places, not on the land, but in the neighborhood of it. To constitute such a notice a sufficient warning, no matter where posted, it was incumbent on the prosecution to prove, by that measure of proof required in criminal prosecutions, that the notice was carried home to the defendant. Actual knowledge, not constructive notice, is what the law exacts. Without such knowledge, or actual notice, there can be no criminality. Notice, like most other facts, may be proved by circumstantial evidence, if sufficiently convincing; and general notoriety in the neighborhood, if proved, may be considered by the jury on such inquiry; not conclusive, but an instrument of proof to be weighed. But, as we have said, constructive notice is not enough. There is a well recognized rule in civil cases, that proof of knowledge of a suggestive fact—one calculated to put the party on inquiry, and which, if followed up, would lead to discovery of the fact sought to be established—is equivalent to proof of actual notice of such material fact.—*Crawford v. Kirksey*, 55 Ala. 282; *Dudley v. Witter*, 46 Ala. 664. We know of no authority, however, for applying this principle to criminal prosecutions.

4. We do not think the question of election between two proven acts, was raised in this case. There was but one act proved; an act somewhat continuous in its nature. A single entry, and moving from place to place on the lands of the prosecutor, on one and the same occasion, could not, it would seem, be divided into two acts of trespass.

What we have said above will show that some of the charges given by the court need to be modified,—specially those which relate to constructive notice. Notice—actual knowledge of the warning—must be shown.

5. The third charge asked by defendant was rightly refused. If the fact of warning, and trespass within six months afterwards, were sufficiently proved, it was not necessary the State should go further, and prove the act was done without legal cause, or lawful excuse. This was defensive matter, the proof of which rested with the defendant, unless the testimony which proved the act, proved also the excuse.—*Hadley v. The State*, 55 Ala. 31.

Reversed and remanded. Let the accused remain in custody, until discharged by due course of law.

Caruthers v. The State.

Indictment for Offer to Bribe Juror.

1. *Bribery of juror; offer of "gift, gratuity, or thing of value."*—Under the statute denouncing the offer to bribe a juror, by the promise of "any gift, gratuity, or thing of value" (Code, § 4118), a conviction may be had on proof of an offer by the defendant, while on trial for another offense, to give his labor or services to one of the jurors, if he would procure an acquittal; as, to "*chop cotton for a week, if he would clear him.*"

2. *Same; sufficiency of indictment.*—When the indictment alleges that the juror was, at the time of the offer to bribe him, engaged with eleven other jurors in the trial of the defendant for a designated offense, it is unnecessary to further allege that he had been summoned, or sworn and impanelled; and an averment that the indictment was for "disturbing females at a public assembly" (Code, § 4200), is a sufficient description of the offense for which the defendant was on trial.

3. *Same; admissibility as evidence, of writing containing offer.*—The offer to the juror having been made in writing, which was proved to have been delivered by his request to the juror, and to which his name was signed, but not spelled as in the indictment,—as *Carethers*, instead of *Caruthers*; the writing is properly allowed to go to the jury, notwithstanding the discrepancy, and although it was not addressed to the juror by name, and did not offer to work for him.

FROM the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case charged, that the defendant, "Spencer Caruthers, did corruptly offer or promise John T. Bell, who was then and there a petit juror, with eleven other petit jurors of the Circuit Court of Barbour county, at Clayton, Spring term, 1833, engaged in the trial of said Spencer Caruthers on an indictment for disturbing females at a public assembly, after said John T. Bell, petit juror as aforesaid, with said eleven other petit jurors, had retired to the jury room, and were considering their verdict on said indictment, a gift, gratuity, or thing of value, to-wit, to chop cotton a week, with the intent to bias the mind, or influence the decision of the said John T. Bell; against the peace," &c. The defendant demurred to the indictment, on these several grounds: 1st, "because it does not aver that said Bell had been summoned as a juror;" 2d, "because it does not aver that said Bell and the eleven others were sworn and impanelled as a jury for the trial of any cause;" 3d, "because it does not aver that the alleged jury, of whom said Bell is alleged to have been one, were at the time

[Caruthers v. The State.]

engaged in the trial of any cause;" 4th, "because there is no such offense as disturbing females at a public assembly;" 5th, "because the act set forth in the indictment does not constitute an offer to bribe by the defendant, and is not an offer of any gift, gratuity, or thing of value." The court overruled the demurrer, and the defendant pleaded not guilty. On the trial, as the bill of exceptions shows, said John T. Bell, being introduced as a witness for the prosecution, "testified in substance that, at the Spring term of said Circuit Court, 1883, he was regularly summoned as a juror; that he and eleven others, duly sworn jurors, were impanelled during said term for the trial of said Spencer Caruthers, who was indicted under section 4200 of the Code; that after said jury had retired to make up their verdict, he heard the defendant call one Lewis, and say to him, '*Give that to Mr. Bell;*' and that said Lewis, a few minutes afterwards, handed him a paper," which was produced, and on which these words were written in pencil marks: "*if you Will clare me Will chop cotton a Week;*" signed, "*Spencer Carethers.*" The defendant objected to the admission of this paper as evidence, "because it did not correspond to the allegation in the indictment;" and "because it did not show when and where said Spencer would chop cotton;" and "because it did not contain an offer to chop cotton for any particular person, and was not a promise to chop cotton for said Bell;" and "because it was not the offer of any gift, gratuity, or thing of value." The court overruled these several objections, and admitted the paper as evidence; to which rulings the defendant excepted.

J. M. WHITE, and H. D. CLAYTON, Jr., for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

SOMERVILLE, J.—The indictment charges the defendant with offering to bribe a juror, in violation of section 4118 of the present Code (1876). One of the offenses denounced by this section is corruptly offering or promising to a juror "any gift, gratuity, or thing of value," with intent to bias his mind, or influence his decision, in relation to any cause or matter pending in any of the courts of this State.

The substance of the offer or promise proved to have been made by the defendant to the juror, Bell, was, that he would "*chop cotton a week,*" if the juror would clear or acquit him. This, in our opinion, was "*a gift, gratuity, or thing of value,*" within the meaning of the statute. The word *thing* does not necessarily mean a *substance*. In its more generic signification it includes an act, or action. So, the word *gratuity* embraces any recompense, or benefit of pecuniary value. The crime

[McQueen v. Lampley.]

charged is closely analogous to that of *embracery* at common law, which has been defined to be, "an attempt to influence a jury corruptly, to one side, by promises, persuasions, entreaties, money, entertainments and the like."—4 Cooley's Black. Com. 140; 1 Russell Cr. *264. The evil of the offense is its tendency to pervert the administration of justice, by tempting jurors to act contrary to the known rules of honesty and integrity. The promise of the defendant to give his *labor* or *services*, as a reward for the corrupt violation of the juror's sworn duty, is a "gift, gratuity, or thing of value," within the signification of the statute.

It was unnecessary to allege in the indictment that the juror, Bell, had been summoned, or sworn and impanelled. It was sufficient that he was alleged to be a petit *juror*, engaged, at the time of the offer, with eleven other petit jurors, in the trial of the defendant on an indictment for a specified offense.

A general description of this offense was all that was requisite. The allegation that the indictment was for "disturbing females at a public assembly" was sufficiently certain to be free from the vice of ambiguity.—Code, 1876, § 4200.

The paper writing signed Spencer *Carethers*, which contains the offer or promise, was properly admitted in evidence. It was shown to come from the hands of the defendant, and to have been transmitted by his authority to the juror. The identity of the defendant with the author of the paper was a matter of inference for the jury. So, with the inquiry as to *whom* the bribe in question was proposed to be offered.

We find no error in the record, and the judgment is affirmed.

McQueen v. Lampley.

Statutory Real Action in nature of Ejectment.

1. *Plea of not guilty, and disclaimer.*—In a statutory action in the nature of ejectment, the plea of not guilty is a conclusive admission of the defendant's possession of the land sued for, and a denial of the plaintiff's title thereto (Code, §§ 2962-3); while a disclaimer is an admission of plaintiff's title, and a denial of defendant's possession; and these two defenses, being incompatible, can not be pleaded together in the same action.

2. *Same, where question is as to location of boundary line.*—Where the land in controversy is a narrow strip lying along the section line which divides the lands of the two parties, each claiming it as a part of his section, and the complaint describing it as a part of the plaintiff's section; the plea of not guilty being a conclusive admission of the defendant's

[McQueen v. Lampley.]

possession of the land sued for, he can not be permitted to prove that said land was not in fact a part of plaintiff's section, as averred in the complaint; while a disclaimer, if not controverted, would entitle plaintiff to judgment for the land, without damages or costs, and leave the location of the boundary line to the sheriff, assisted, perhaps, by a surveyor; thus operating a hardship on the defendant, which suggests the propriety of legislative interference.

APPEAL from the Circuit Court of Butler.
Tried before the Hon. JOHN P. HUBBARD.

BUELL & LANE, for the appellant.

J. C. RICHARDSON, and JNO. GAMBLE, *contra*.

STONE, J.—The facts of this case present a novel question for solution, under the statutes of this State, as construed by this court. The plaintiff below, appellant here, owned lands extending to the north boundary of the north-west quarter of the north-west quarter of section 22, township 10, range 14. The defendants owned and were in possession of lands adjoining this tract on the north, being the south-west quarter of the south-west quarter of section 15, same township and range, and extending to the southern boundary of the section. It will thus be seen that the two freeholds are co-terminous. A dispute arose as to the proper location of the line which divided the two tracts; the plaintiff claiming that the defendants were in possession of the north end of her tract, a strip sixty or eighty feet in breadth. The true contention was, whether the strip in dispute lay in the one section or the other. The plaintiff in her complaint claimed "a strip of land one hundred feet wide off the north end of the north-west quarter of the north-west quarter of section 22, township 10, range 14, in Butler county, Ala.," &c.; which, she averred, was in the possession of the defendants. Under our statutes and decisions (Code of 1876, §§ 2962-3; *Bernstein v. Humes*, 60 Ala. 582; *Kirkland v. Trott*, 66 Ala. 417), if defendants took issue by pleading not guilty, they thereby admitted themselves in possession of the lands sued for. They set up no claim to any part of section 22. How was that issue to be raised, so as to have the jury pass upon it? If defendants had disclaimed possession of the land sued for—that described in the complaint—plaintiff, not taking issue on the denial, and not averring possession, would have had judgment for the lands, but without costs. And if the sheriff had been commanded to put the plaintiff in possession of the lands she had thus recovered, the judgment could have afforded him no guide. On him would have been cast the burden of ascertaining the true line, assisted, perhaps, by a surveyor. This would have fallen far short of a judicial ascertainment of

[McQueen v. Lampley.]

the boundary; the only purpose for which the suit was brought, and the only good it could accomplish.

The defendants sought to raise their defense as above stated, in several forms; but their various attempts to plead what amounted to the general issue, coupled with a denial that they were in possession of any lands in section twenty-two, were ruled out by the court. They finally went to trial on the plea of not guilty, and the statute of limitations of ten years. The court, against the objection of plaintiff, admitted testimony on the disputed question, whether the strip of land in controversy lay in section 15 or in 22. The jury were charged, that plaintiff must recover on the strength of her own title; and that she could not recover, unless the defendants were in possession of lands to which plaintiff had shown title. There was verdict and judgment for the defendants.

In statutory real actions in the nature of ejectment, the plea of not guilty, as we have stated above, is an admission—a conclusive admission—that the defendant is in possession of the lands sued for. The lands sued for in this case are described in the complaint as lying in section 22. This description is in accordance with the statute, and is sufficient.—Code of 1876, § 2960. The complaint does not claim title to any lands in section 15. The plea of not guilty, interposed by defendants, was, therefore, an admission that the strip of land across the north-west quarter of the north-west quarter of section 22, was in the possession of the defendants. Hence, the contention was over lands in section 22, and the issue was narrowed to the question of title, the question of possession having been eliminated by the pleadings. It follows, that the defendants, appellees, were improperly allowed to offer proof that they were not in possession of the part of section 22 described in the complaint. They had admitted that by their plea, and were estopped from disproving it.—*Cochran v. Miller*, ante, p. 50; *King v. Kent*, 29 Ala. 542; *Bernstein v. Humes*, 60 Ala. 582. In the present suit, the only question in issue being that of title to the lands described in the complaint, the plea of not guilty puts the title, and only the title, in issue. Disclaimer, or denial of possession, would have put in issue the question, and only the question, of possession. The former is an admission of defendants' possession, with denial of plaintiff's title; the latter, an admission of plaintiff's title, with denial of defendant's possession. They are incompatible defenses, and can not be pleaded together. *Bernstein v. Humes*, supra.

Denial, or disclaimer of possession of the lands sued for, would have been a denial that the lands, of which defendants had the possession, were in section 22. If, on such disclaimer interposed, plaintiff had not controverted it, by averring the de-

[Joseph v. Cawthorn.]

fendants were in possession, then plaintiff could have taken judgment for want of plea, and would have recovered the lands described in his complaint, but without damages or costs. This would have given her a right to the lands, extending up to the northern boundary of section 22; for the lands described in her complaint extended to that boundary. It would not, and could not, have determined where the true dividing line ran. That would not, in such supposed case, have been put in issue. As stated above, the duty of ascertaining where the true line was would have rested on the sheriff, in executing the writ of possession. Such judgment could not have accomplished the purpose the parties had in view.

In what is stated above, it is shown that, in such a case as this, if the defendant disclaim possession, the plaintiff may take judgment, and thus prevent a judicial ascertainment of the disputed boundary, and leave it for determination by the sheriff. We submit if there should not be some change of the statute on this subject. Should not a defendant, in a case like the present, have equal right with the plaintiff, who brings him into court, to so plead as to put the question of boundary in issue, and have the jury pass upon it? The plaintiff, by controverting the disclaimer, and averring the defendant was in possession when the suit was brought, may have a verdict and judgment on the question of boundary. He may, however, decline to do so, and thus leave the controversy in such form as to invite other suits. We may add, that if defendant denies possession, and plaintiff forms an issue upon it in the manner indicated above, that will present the question of boundary, on which there may be verdict and judgment.

Reversed and remanded.

Joseph v. Cawthorn.

Action commenced by Attachment.

1. *Official oath of deputy-clerk.*—Under the general statute (Code, § 676), deputy-clerks are required to take an official oath; and the special statute “regulating the holding of the Circuit Courts of Barbour county” (Sess. Acts 1878–9, pp. 106–09), authorizing the appointment of a deputy by the circuit clerk, does not dispense with the necessity of a compliance with this provision by such deputy.

2. *Attachment issued by deputy-clerk, who has not taken official oath.* An attachment, issued by a deputy-clerk who is performing the duties of the office under appointment by his principal, is not voidable, nor subject to be abated on plea, because he has never taken the official

[Joseph v. Cawthorn.]

oath prescribed by law; his official acts, like those of any other officer *de facto*, having the same force and effect, so far as the public and third persons are concerned, as the acts of an officer *de jure*.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by M. Joseph, against T. P. Cawthorn, and was commenced by original attachment, which purported to be issued by Henry Bradley, clerk of said Circuit Court, on the 24th October, 1882, and to be founded on an affidavit made before him by the plaintiff's agent. The defendant cravedoyer of the attachment and affidavit, and pleaded in abatement, "that the said affidavit was not administered by the said Henry Bradley, the clerk of said court, nor was the *jurat* thereto signed by him, but one B. James administered said affidavit, and signed said *jurat*, without the presence of said clerk, and without special authority for so doing; that said clerk did not issue said writ of attachment, but the same was issued by one B. James, without the presence of said clerk, and without special authority for so doing. And defendant avers, that said B. James was not the legal deputy of the said clerk, and had no authority of law to administer such affidavit, nor to issue said writ of attachment; that said attachment was issued by said James without lawful authority for so doing, and that he was not qualified to issue said attachment." Issue being joined on this plea, it was proved, as the bill of exceptions shows, that said Henry Bradley, the clerk of said court, resided at Clayton in said county, and there kept an office; that he also kept an office at Eufaula, as authorized by the special statute approved February 12th, 1879, entitled "An act to regulate the holding of the Circuit Courts of Barbour county;" that said B. James was appointed and employed by him, under the provisions of this act, to attend to the duties of the office at Eufaula, and "was authorized by him to have and exercise all his powers and duties as clerk in said office; that said appointment was given and accepted verbally, and said James never took an oath of office, nor entered into bond under said appointment; that said affidavit was administered by him, said attachment bond approved, and said writ of attachment issued by him, while performing the duties of said office under said appointment; and that said acts were not performed in the presence of said Bradley, nor did he know of such acts until after they were performed."

The said special statute, which was read in evidence by the plaintiff, provides for holding terms of the Circuit Court at both Clayton and Eufaula, and contains the following provisions in reference to the clerk: *Sec. 3.* "The clerk of said court

[Joseph v. Cawthorn.]

shall keep an office at the court-house in Clayton, and another office in said city of Eufaula; and the records, docket and papers of causes to be heard in Eufaula shall be kept in his office there, and the records, docket and papers of causes to be heard at Clayton shall be kept in his office there; and said clerk may reside either in Clayton or Eufaula, but shall have a competent assistant at the place where he does not attend in person; and both offices shall be kept open for the transaction of business, as is required by law of clerks of the Circuit Courts."

Sec. 9. "The person employed by the clerk of the Circuit Court to keep an office at Clayton or Eufaula shall, in the name of such clerk, have and exercise all the powers now or hereafter vested in the clerks of the Circuit Courts in this State; and the clerk of the Circuit Court shall be responsible for all the acts, defaults, and omissions of such person so appointed his deputy, and may require a bond of such person, in the same amount as he is required to give as such clerk, and conditioned as his bond as such clerk."—Sess. Acts 1878-9, pp. 106-09.

This being all the evidence, the court charged the jury, that they must find for the defendant, if they believed the evidence; and this charge, to which the plaintiff excepted, is now assigned as error by him.

ROQUEMORE & SHORTER, for appellant.—The clerk had power, under the general law, to appoint a deputy, who could exercise all the powers conferred by statute on himself, and would be required to take an official oath.—Code, § 676. The provisions of the special statute, as to the appointment of a "competent assistant" to attend to the duties of one of the two offices, are superfluous and meaningless, if the powers of the clerk and his assistant are still the same as under the general law. Some meaning must be given to these provisions, and that can only be done by making them supersede the general law, so far as the two differ.—1 Bla. Com. 87, 89. The special statute does not require an official oath to be taken by the assistant, and makes it discretionary with the clerk to require an official bond from him.

H. D. CLAYTON, Jr., *contra*.—The issue of an attachment is in its nature a judicial act.—*Matthews v. Ansley*, 31 Ala. 20; *Matthews v. Sands & Co.*, 29 Ala. 136; *Stevenson v. O'Hara*, 27 Ala. 302. A judicial act can only be performed by the person in whom the trust is reposed, while the power to perform a ministerial act may be delegated to another.—*Kyle v. Evans*, 3 Ala. 481; *Slater v. Carter*, 35 Ala. 679. All deputy-clerks are required to take an official oath, and all other deputies unless "employed in particular cases only" (Code, §§ 161, 676);

[Joseph v. Cawthorn.]

and this is founded on principles of public policy, as well as express constitutional provisions. The special statute does not expressly dispense with this requirement, and there is nothing in its provisions from which a repeal by implication is to be implied. Such repeal is only allowed in cases of direct repugnancy.—Cooley's Const. Lim. 185; 19 Ala. 738; 64 Ala. 203, 282; 6 Porter, 219; 33 Ala. 693.

SOMERVILLE, J.—We are clearly of opinion, that there is nothing to be found in the provisions of the special act of the General Assembly, entitled "An act to regulate the holding of the Circuit Courts of Barbour county," approved February 12, 1879, which dispenses with the necessity of an official oath being taken by the deputy circuit clerk, authorized to be appointed by that act.—Acts 1878–79, pp. 106, 109. The general law provides, that deputy-clerks must take an official oath to support the constitution and laws of the State, before they proceed to act.—Code, 1876, §§ 161, 676, sub-div. 2. This is in accordance with the State Constitution, that an official oath shall be taken by all officers of the three several departments of government. As said in *Chappell v. The State*, 71 Ala. 324, "every instrumentality connected with the administration of the law, is required to be oath-bound. Such has been the law as far back as our knowledge of English jurisprudence extends." So strict is the policy of the law in this particular, that it is made a misdemeanor in this State for "any officer or *deputy*," who is required to take and file an oath of office, to enter upon the duties of his office without first doing so.—Code, 1876, § 4160.

This is the positive exaction of the general law. The special law in question is silent on the subject of oaths. The former includes all deputies. The latter fails to exempt the particular deputy, authorized to be appointed under its provisions. There is, therefore, no repugnancy between them. The point must be conceded to be well taken, that the deputy-clerk, who issued the attachment in question, was required by statute to take an official oath before entering upon the duties of his office.

But it is an error to suppose that his failure to take such oath vitiated the issue of the writ of attachment, or authorized its abatement. The deputy-clerk was an officer *de facto*, beyond all question. The clerk was empowered to appoint him to the office, with full authority vested in him by law to exercise all the powers vested in the clerk himself. The appointment was made, and the deputy was in the daily exercise of his official duties, under color and claim of his office. It has frequently been decided, and it is clear upon principle, that the failure of an officer to conform to some statutory condition, or

[Daily's Adm'r v. Reid.]

constitutional requirement, such as taking an oath, giving bond, or the like, does not remove his *de-facto* character, where he is acting under color of a known and valid appointment or election.—*State v. Carroll* (38 Conn. 449), 9 Amer. Rep. 409.

There is no distinction in law between the official acts of an officer *de jure*, and those of an officer *de facto*. So far as the public and third persons are concerned, the acts of the one have precisely the same force and effect as the acts of the other. The only difference between the two is, that the latter may be ousted from his office by a direct proceeding against him in the nature of *quo warranto*, and the former can not. Their official acts are equally valid. The rule is one which is dictated alike by principles of justice and public policy. It would be a great hardship, if innocent persons were made to suffer by the unknown negligence of officials, who, under color of office, were daily holding themselves out to the public as officers *de jure*. *People v. Staton* (73 N. C. 546), 21 Amer. Rep. 479; *Heath v. The State*, 36 Ala. 273; *Mayo v. Stoneum*, 2 Ala. 390; *Mastersson v. Matthews*, 60 Ala. 260; *Sheehan's case* (122 Mass. 445), 23 Amer. Rep. 374; *Freeman on Judg.* (3d Ed.) § 604; *United States v. Insurance Co.*, 22 Wall. 99.

It is manifest, under the foregoing principles and authorities, that the attachment proceedings were in no wise affected by the failure of the deputy-clerk to take the oath of office, and they were not subject to abatement by plea on this account. If this officer had been a mere usurper, acting without any color of authority, his acts might be void, and such a plea probably be held good. The case of *Lowry v. Stowe*, 7 Port. 483, does not go further than this.

The judgment is reversed, and the cause remanded.

Daily's Adm'r v. Reid.

Bill in Equity to enforce Vendor's Lien on Land.

1. *Infants; how brought in as parties.*—A decree *pro confesso*, against an infant, is unauthorized and void; and the cause is not at issue as to him, until after a guardian *ad litem* has been appointed, and has answered.

2. *Same; depositions taken before answer.*—Depositions in a chancery cause, taken before the cause is at issue as against an infant who is a material defendant, will be disallowed as evidence against him, and no motion to suppress them is necessary.

3. *Vendor's lien; when assignee may assert.*—An assignee of a promissory note, given for the purchase-money of land, can not assert a ven-

[Daily's Adm'r v. Reid.]

dor's lien on land, when the transfer was by delivery merely. (Changed by statute approved Feb. 13, 1879.—Sess. Acts 1878-9, p. 171.)

APPEAL from the Chancery Court of Blount.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 1st December, 1871, on the equity side of the Circuit Court of Blount county (under the provisions of the constitution of 1868), by George Daily, against the administrator of the insolvent estate of James Reid, deceased, together with the surviving widow of said decedent, and his infant daughter, James Eliza P. Reid. Its object was to enforce an alleged vendor's lien on a tract of land, which the complainant had sold and conveyed to one Matthew Nelson, and which Nelson afterwards sold to said James Reid. The cause having been transferred to the Chancery Court, the chancellor dismissed the bill, on final hearing on pleadings and proof; and his decree is now assigned as error. The opinion states the material facts.

HAMILL & DICKINSON, for appellant.

STONE, J.—The bill in this case was filed to enforce an alleged vendor's lien. The bill was filed in 1871, by George Daily, the vendor, who was then in life. Pending the suit, George Daily died, and there was a revivor in the name of George J. Daily, his administrator. The bill avers that, in 1856, Daily sold the lands sought to be condemned, to Nelson, at the price of one thousand dollars, to be paid, and made him a deed, conveying title to him. The bill then avers that Nelson, on the 13th February, 1860, having paid nothing for said land, sold and conveyed the same to James Reid, at the agreed price of thirteen hundred dollars, part cash and part credit; that three notes, part of the purchase-money due from James Reid to Nelson, became the property of Daily, the complainant, in part payment or security of the purchase-money due from Nelson to Daily, and that when the bill was filed, there was due and unpaid, of the principal and interest of said notes, the sum of three hundred and seventy-eight 40-100 dollars. The notes are made exhibits to the bill. Two of them bear date February 15th, 1860, and are payable to Nelson; each for one hundred and fifty dollars, due severally 25th December, 1860, and 1861. These notes are without Nelson's indorsement, being traded, if at all, by delivery. The other note bears date February 28th, 1860, due 15th April then next, for the sum of two hundred and seventy dollars, payable directly to George Daily.

Before this suit was brought, James Reid and Nelson had

VOL. LXXIV.

[Daily's Adm'r v. Reid.]

both died. Dennis Reid, administrator of James Reid, Elizabeth Reid, his widow, and James Eliza P. Reid, his infant daughter, under fourteen years of age, were made defendants to the bill. The estate of James Reid was reported and declared insolvent, and one hundred and eighty of the two hundred and eighty acres of land sold, had been allotted and set apart to the said minor child, as exempt to and for her. The other hundred acres had been sold under decree of the Probate Court, for the payment of debts, and the proceeds had gone into the final settlement of the insolvent estate of said James Reid. All these proceedings took place before this bill was filed, and are averred in the bill. The one hundred and eighty acres of land so allotted to James Eliza P. Reid, the infant, it is the object of this bill to have sold. It will thus be seen that James Eliza P. Reid, the infant, is the only defendant sought to be affected by the decree.

A summons was issued and served; the service for James Eliza P. Reid being perfected by service on her mother, for her, December 9th, 1871. On the 8th January, 1872, Barelift, having consented thereto in writing, was appointed guardian *ad litem* for the infant defendant; and the same day, decrees *pro confesso* were moved for and obtained against all the defendants, the infant included. No answer for the infant defendant was put in by Barelift, nor by any one else, until October 21st, 1876, after Shelton had been appointed guardian *ad litem*. He put in the customary answer, denying the allegations of the bill.

On the 26th day of January, 1872, complainant filed with the register interrogatories to many witnesses, to be examined for him. No notice of the filing of these interrogatories was served on any of the defendants, nor were any cross-interrogatories filed. On the same day (26th January, 1872), commission was issued to take the testimony of these witnesses, and it was soon afterwards taken. This, it will be observed, was before the bill was put at issue against the infant, by answer of the guardian *ad litem*. It need scarcely be observed, that this was palpably irregular. There is no authorized practice allowing a decree *pro confesso* against an infant, and such proceeding, when attempted, is simply void; and testimony, thus taken, needs no motion to have it suppressed. The Court of Chancery is the guardian of all infant litigants before it, and will permit no such irregularity and error to pass unredressed. The testimony, falling within this rule, must be disallowed, so far as the rights of the infant defendant are concerned.—*Stammers v. McNaughten*, 57 Ala. 277; *Lee v. Lee*, 55 Ala. 590. This ruling applies to, and excludes the testimony of George Daily, Dennis Reid, A. J. Brown, and James Blackwood.

[Marsh v. Marsh.]

The complainant's case rests mainly on the testimony of Champion Cornelius. He alone makes any direct proof that James Reid owed or owes any of the purchase-money of the lands; and he only speaks of an admission by Reid, in his lifetime, that he was indebted for the lands. He speaks of no amount he admitted he owed, and so we are entirely uninformed as to the sum due. There is another, and a fatal defect in the testimony. The bill, it will be remembered, charges that the three notes, made exhibits to the bill, furnish the evidence of the amount of the purchase-money due from Reid. These are the debts counted on, and claimed in the bill. There is an entire absence of testimony that these notes, or either of them, was given in the purchase of the land. They are all dated after the execution of the deed, one of them many days afterwards. Even if it had been shown that they were given in the purchase of the land, two of the notes are payable to Nelson, and are not indorsed. These could not maintain a bill by Daily, commenced when this suit was.—*Hightower v. Riggsby*, 56 Ala. 126. The bill must fail, for want of proof of this indispensable fact.

We need not consider the question of amendment; for, if allowed, the complainant must have failed for want of proof of the very foundation on which his suit rests.

The decree of the chancellor is affirmed.

Marsh v. Marsh.

Bill in Equity for Reformation of Deed.

1. *Reformation of deed, on ground of mistake; sufficiency of evidence.* A court of equity will not decree the reformation of a written instrument on the ground of mistake, on parol evidence only, unless the mistake is plain, and is clearly established by full and satisfactory proof.

APPEAL from the Chancery Court of Crenshaw.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 7th November, 1882, by Needham Marsh, against Jefferson Marsh, who was his son, and against James Hall and wife; and sought the reformation of a conveyance of a tract of land, executed by said Hall and wife, in which the name of said Jefferson Marsh was inserted as the grantee. The deed was dated the 18th November, 1869, recited the payment of \$480 by said Jefferson Marsh as its con-

[Marsh v. Marsh.]

sideration, was signed by the grantors by mark only, and was duly acknowledged by them, on the day of its date, before the justice of the peace by whom it was written. The bill alleged that, by mistake of the draughtsman, the lands intended to be conveyed were not correctly described, and the name of said Jefferson was inserted instead of the complainant's own name; that he had allowed said Jefferson to take possession of the land as his tenant, and discovered the mistake in the deed, on the said Jefferson's refusal to surrender the possession, about two months before the bill was filed. An answer to the bill was filed by Jefferson Marsh, denying the alleged mistake, and alleging that his father bought the land for him, and placed him in possession under the deed; and that his father never claimed the land, or asserted that there was a mistake in the deed, until after the death of the draughtsman. A decree *pro confesso* was entered against Hall, and his deposition was afterwards taken by the complainant; the substance of his testimony being, that the purchase-money for the land was paid by the complainant, he and his son both being present, and that he did not recollect to which one of the two the deed was delivered, but that the contract for the purchase was made with said Jefferson. The complainant testified as a witness for himself, and stated the facts as alleged in the bill; and he took the depositions of several witnesses, who testified as to declarations by said Jefferson, while in possession of the land, that it belonged to his father. On final hearing, on pleadings and proof, the chancellor held the evidence insufficient to authorize a reformation of the deed, and therefore dismissed the bill; and his decree is now assigned as error.

W. D. ROBERTS, for appellant.

SOMERVILLE, J.—The rule is uniformly settled, that a court of equity will not reform a written instrument, by correcting an alleged mistake in it, on parol evidence, unless the mistake is plain, and clearly established by full and satisfactory proofs.—*Clopton v. Martin*, 11 Ala. 187; 1 Brick. Dig. 685, § 664, and cases cited; 1 Story's Eq. Jur. § 157. As expressed by Mr. Waterman, "the parol testimony must be clear and strong, and such as to leave no doubt of the mistake."—Waterman on Spec. Perf. § 380. In many adjudged cases, it has been said, that the mistake must be proved "beyond a reasonable doubt." *Hudson Iron Co. v. Stockbridge Iron Co.*, 107 Mass. 290; *Shattuck v. Gay*, 45 Vt. 87; *Edmonds' appeal*, 59 Penn. St. 220. It is said by Mr. Story, that all relief is forbidden, "whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt, or to opposing presumptions."—1 Sto-

[Bell v. The State.]

ry's Eq. Jur. (12th ed.) § 157. Mr. Pomeroy, in his recent and most excellent treatise on Equity Jurisprudence, says: "The authorities all require, that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing: in the language of some judges, 'the strongest possible;' or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation, upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error." 2 Pom. Eq. Jur. § 859, *Note 2*, and cases cited.

The application of this rule is fatal to the present case. The evidence is far from being sufficiently clear and satisfactory, to establish the alleged mistake in the deed made by Hall to the defendant, Jefferson Marsh. The chancellor so decided, and his decree is affirmed.

Bell v. The State.

Indictment for Arson.

1. *Proof of ill-feeling, as showing motive.*—It is sometimes permissible to prove the enmity, or state of ill-feeling, existing between the defendant and the prosecutor, or person whose property has been injured, as tending to show a motive for the crime; but, when such evidence is admissible, the inquiry is limited to the motive or ill-feeling of the defendant himself, and does not extend to members of his family, "unless, perhaps, very special circumstances might vary the rule."

2. *Same.*—The defendant being on trial for the arson of a mill belonging to one S., a witness for the defense was asked, on cross-examination, "the state of feeling between the defendant's family and S.'s family;" and answered, "that it was good, but some of the defendant's family did not like Mrs. S. much." *Held*, that the evidence was irrelevant and ought to have been excluded.

3. *Recalling witness; what is revisable.*—The refusal to allow a witness to be recalled, for the purpose of laying a predicate to impeach him, is within the discretion of the primary court, and is not revisable.

4. *Costs of return to certiorari.*—A certiorari having been granted in this case, to perfect the record by showing the organization of the grand jury and other proceedings, it was ordered, that the clerk be allowed no costs for the return.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The indictment in this case charged the defendant, James Bell, with the willful burning of the mill and gin-house of Lee Stewart. The defendant pleaded not guilty, and was tried on

[Bell v. The State.]

issue joined on that plea. On his trial, he reserved numerous exceptions to the rulings of the court in the admission of evidence, and in the matter of charges given and refused; and these several rulings were here urged as error. A *certiorari* was granted, on motion of the Attorney-General, to perfect the record by showing the organization of the court, the impaneling of the grand jury, and other matters omitted from the transcript first filed.

N. W. GRIFFIN, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—A witness for the defense was asked, on cross-examination, “what was the state of feeling between defendant’s family and Stewart’s family.” Stewart was the owner of the mill, for the alleged burning of which defendant was on trial. This question was objected to, the objection overruled, and defendant excepted. “The witness replied, that it was good, but that some of defendant’s family did not like Mrs. Stewart much.” Defendant then moved to exclude said answer; the motion was overruled, and defendant again excepted. The purpose of this evidence must have been, to show a motive for the commission of the imputed crime. This is permissible, in proper cases.—Whar. Cr. Ev. § 784. But, in such cases, the inquiry is as to the motive of the accused himself, and not of another, even though that other be a member of his own family; unless, perhaps, very special circumstances might vary this rule. That some of the defendant’s family did not like Mrs. Stewart, is certainly too remote and unreliable a circumstance, to be received as evidence that defendant had a motive for burning Mr. Stewart’s mill. If we are mistaken in the purpose for which the testimony was offered, then we can conceive of no legitimate purpose for its introduction, and it was wholly irrelevant. This must work a reversal of the case.

Most of the other questions argued will not be likely to arise again, and we need not consider them. The refusal of the court to allow the witness Johnson to be recalled, for the purpose of laying a predicate for his impeachment, was within the discretion of the court, and not revisable.—*Mosely’s case*, 2 Ala. 43.

Reversed and remanded. Let the accused remain in custody until discharged by due course of law.

The clerk of the Circuit Court will be allowed no costs for the return to the *certiorari*.

Mosely & Eley v. Norman.

Bill in Equity by Administrator and Guardian, for Settlement of Accounts; Petitions by Solicitor and Intervening Creditor.

1. *Attorney's lien on judgment or decree.*—As a general rule, an attorney or solicitor has a lien on a judgment or decree obtained by him for his client, to the extent of reasonable compensation for services rendered and disbursements made in the particular case; he being regarded, to this extent, as an equitable assignee of the judgment or decree from the day of its rendition, and entitled to protection against collusive dealings between his client and the adversary party; but the lien extends no further, and it is subordinate and inferior to the right of set-off, as against the client, of all existing debts or demands, the subject of set-off at the time the judgment or decree was rendered.

2. *Contracts of administrators, guardians, and other trustees; remedy of creditor, as against estate*—The contracts of guardians, administrators, or other trustees, though made in execution of the trust, and in the performance of a legal duty, impose upon them a personal liability, and create no liability against either the trust estate or the beneficiaries; but, if the estate is indebted to the trustee on settlement of his accounts, and he is insolvent, as shown by the exhaustion of legal remedies against him, and the contract has enured to the benefit of the trust estate or its beneficiaries, a court of equity will subrogate the creditor to his rights against the estate.

3. *Approval of voluntary act which court would have compelled.*—A court of equity often regards that as done which ought to have been done; and when the parties voluntarily agree to do that which the court would compel them to do, the court will uphold and give effect to the agreement.

4. *Same; conflicting claims of attorney and creditor, to judgment in favor of administrator.*—An administrator and guardian having contracted debts for the benefit of his wards, the distributees, and, on final settlement of his accounts under a bill filed by him, having been allowed a credit for the amount of the accounts, on the production of the creditor's receipt, and thereby obtained a decree against the estate for that amount; and it being shown that the receipt was given under an agreement that the decree should enure to the benefit of the creditor, that the allowance of the credit was not contested, and that the trustee was insolvent; held, that the court, giving effect to the agreement, would uphold an assignment of the decree to the creditor, against the lien of the attorney and solicitor for services rendered in the settlement.

APPEAL from the Chancery Court of Bullock.

Heard before the Hon. JOHN A. FOSTER.

This was a contest between the appellants, partners doing business under the firm name of Mosely & Eley, and James T. Norman, an attorney at law and solicitor in chancery, as to their respective rights to a fund in court, amounting to \$252.77.

[Mosely & Eley v. Norman.]

The money was paid into court by James McLaney, as the administrator *de bonis non* of the estate of James L. Powell, deceased, being the amount due on a decree against the estate, in favor of A. J. Pittman, the former administrator. The decree was rendered on the 15th March, 1882, under a bill filed by said Pittman, which is not set out in the record, but which seems to have been filed for the purpose of settling his administration of said estate. Norman claimed a lien on the fund, for his compensation on account of professional services rendered in the cause for the complainant; and having filed his petition asserting his lien, the register reported, by consent, that \$230 was a reasonable fee for his services. Mosely & Eley claimed the money under an assignment of the decree to them by said Pittman, which was dated the 18th March, 1882, and in these words: "For value received, I hereby transfer, assign, sell and convey to Mosely & Eley the decree in my favor against said estate, amounting to \$205.41; with full power to them to collect the same in my name, or otherwise, as by law required in such cases."

In their petition propounding their claim, Mosely & Eley alleged that the bill was filed by said Pittman, as administrator, "praying, among other things, for the ratification of certain acts done by him as the guardian of certain minor heirs of said Powell, and that certain sums of money expended by him as such might be allowed him as credits as administrator with the will annexed of said Powell;" that a reference to the register was ordered, for a statement of the accounts between the administrator and the estate; that said Pittman, "before that time, had purchased and obtained from these petitioners, for the use and benefit of R. H. Powell, one of the minor heirs of said estate, necessary goods, wares and merchandise, and cash money, amounting to \$122.97," and for B. F. Powell, another minor heir, to the amount of \$82.71; that while the reference was being held by the register, these accounts "being outstanding and unpaid, and said Pittman being insolvent and unable to pay the same, he proposed that your petitioners should receipt said accounts, so that he might use them as vouchers on his said settlement, and get credits for the same against said estate, stating that said accounts, if allowed, would swell his account against the estate, and thereby probably secure to him a decree against the estate, which decree, if so rendered, he offered and agreed to transfer and assign to your petitioners, to secure the payment of said accounts to them, in whole or in part, as said decree might be sufficient;" that the accounts were accordingly receipted by them, and were used on the settlement by said Pittman, and were allowed to him as proper credits, and made the balance decreed in his favor; and that

[Mosely & Eley v. Norman.]

the decree was assigned to them by him, a few days after its rendition, in pursuance and fulfillment of this agreement.

The chancellor sustained a demurrer to the petition of Mosely & Eley, interposed by Norman, and declared a lien on the fund in his favor; and this decree is now assigned as error.

WATTS & SON, and N. B. FEAGIN, for appellants, cited *Donald & Co. v. Hewitt*, 33 Ala. 534; *Stearns v. Gafford*, 56 Ala. 544; *Ellington v. Charleston*, 51 Ala. 166; *Mervine v. White*, 50 Ala. 388; *Coopwood v. Wallace*, 12 Ala. 790; *Mulhall v. Williams*, 32 Ala. 489; *Ex parte Lehman*, *Durr & Co.*, 59 Ala. 631.

H. C. TOMPKINS, *contra*, cited *Warfield v. Campbell*, 38 Ala. 527; *Marshall v. Meech*, 51 N. Y. 140; *Andrews v. Moore*, 12 Conn. 444; *Jackson v. Clopton*, 66 Ala. 29; *Sexton v. Pike*, 13 Ark. 193; *Hutchinson v. Howard*, 15 Vermont, 544; *Hunt v. McClanahan*, 1 Heisk. 503; Weeks on Attorneys, §§ 368-70; Freeman on Judgments, § 211; 31 Amer. Dec. 755, *Note*.

BRICKELL, C. J.—As a general rule, an attorney is entitled to a lien on a judgment or decree he may have obtained for his client, to the extent of reasonable compensation for the services rendered in and about the obtaining such judgment or decree. The lien does not arise or attach until the rendition of the judgment or decree, and it is limited to compensation for services rendered, or disbursements made for the client, in and about obtaining the judgment or decree. It is not a general lien, operating as a security for any other claim or demand, however meritorious it may be. For other debts, or for a general balance due him, the attorney may have a lien on papers or documents coming to his possession in the course of his professional employment; but that lien is distinguishable from the particular lien he may have on a judgment or decree.—Overton on Liens, 68. The theory upon which the particular lien rests is, that from the day of its rendition the attorney or solicitor is regarded as an equitable assignee of the judgment, to the extent of the compensation and disbursements justly due him.—*Ex parte Lehman*, 59 Ala. 631. The lien is protected against all collusive dealings between the client and the party against whom the judgment or decree is rendered; but it is subject to, and may be defeated by the right to set off against the client existing debts or demands, the matter of set-off when the judgment or decree is rendered.—*Ex parte Lehman*, *supra*; *Jackson v. Clopton*, 66 Ala. 29. It is indispensable to the existence of the lien, that services should have been rendered, or disbursements made, in and about obtaining the particular judgment or

[Mosely & Eley v. Norman.]

decree. A mere general debt due to the attorney is not the foundation of the lien.—*Jackson v. Clopton*, 66 Ala. 29.

The decree now in controversy is for the balance found due Pittman, the guardian and administrator, upon the final settlement of the trusts of his administration in each capacity. The balance originated from the allowance to him, as credits, of accounts he had contracted with the appellants, for necessities for the use of the infant wards. The credits could not have been allowed, the balance could not have been created, unless Pittman had produced the accounts, accompanied with evidence of their payment. Such evidence Pittman obtained from the appellants, upon an agreement that the balance found due to him, in consequence of the allowance of the accounts, should enure to their benefit, and should be appropriated and applied in payment of the accounts due them; and after the rendition of the decree, he made a formal written assignment of it for that purpose. The accounts were the mere personal debts of Pittman, not creating any liability upon the infant wards; and from them, though they were for necessities enuring to the use of the wards, the appellants could not claim an equity to pursue and subject their estates. The purchases of trustees, including executors, administrators, or guardians, though made in execution of the trust, and in performance of duty resting upon them, create a personal liability. The seller can look to them only for payment, and they must look for reimbursement, after making payment, to the trust estate.—*Sanford v. Howard*, 29 Ala. 684. But if, upon a settlement of the administration of the trust estate, the estate is indebted to the trustee, and he is insolvent, the insolvency being shown by the exhaustion of legal remedies, and the purchases have enured to the benefit of the trust estate, or to the benefit of the *cestuis que trust*, the inference from the former decisions of this court is just, that a court of equity would interfere for the relief of the creditor, and, so far as necessary for his protection, subrogate him to the rights of the trustee against the trust estate.—*Askew v. Myrick*, 54 Ala. 30, and authorities cited. It was, doubtless, in this view of the legal and equitable rights of the parties, that the agreement between them was made, which, when carried into effect, as it was intended it should be, simply operated to dispense with the pursuit of legal and equitable remedies. When parties agree to do that to which they can be compelled, the agreement is favored in law, and it will be carried into effect. The maxim upon which a court of equity proceeds, of regarding that as done which ought to have been done, is liberally applied to such agreements.—1 Story's Eq. § 64; *Wilson v. Sheppard*, 28 Ala. 623; *Marks v. Cowles*, 53 Ala. 499; *Foscue v. Lyon*, 55 Ala. 440.

The lien of an attorney has in it much of an equity, espe-

[Mosely & Eley v. Norman.]

cially in its operation upon judgments or decrees; and in its protection and enforcement, a court of law exercises its inherent powers to regulate and control its own process, often denominated the equitable powers of the court. There is much of justice in the observation of a recent writer: "Courts, being bound to protect the attorney so far as possible, will always examine and inquire into the equities of the case, and will sustain or defeat the lien accordingly."—Overton on Liens, 84. An assignment of the subject-matter of suit, while the suit is pending, or of the judgment or decree after its rendition, ought not to affect, and is not allowed to affect, the lien of an attorney or solicitor upon the judgment or decree; the assignment is subordinate to the lien. But that is not the case before us. The accounts due to the appellants were not within the scope of the *lis pendens*; and until their payment by the guardian and administrator, or until evidence of payment was obtained, upon which the court would act, they could not be drawn within its scope. When that evidence was obtained, by the agreement of the parties at the time it was given, and upon the faith of which it was induced, the balance due to the guardian and administrator, arising from the credit for the accounts, was appropriated for the benefit of the appellants, who had not actually received payment. The credit obtained for the accounts created the balance now due; but for such credit, the balance would not exist.

If the solicitor had rendered service in obtaining an allowance of such credit, and in the consequent creation of such balance, a lien for reasonable compensation for such service would be just and equitable. But it is not just and equitable that a lien should be attached for the general balance due to him, for all the services rendered by him in the particular case. The practical effect of such allowance is, not only to defeat the equity of the appellants, to nullify the agreement upon which they acted, but to compel them to create a fund for the benefit of the solicitor. In consideration of all the equities of the case, the prior equity of the appellants ought to prevail over the lien asserted by the solicitor for the general balance due him for the services rendered in the case, in which the sum due from the trust estate was ascertained and allowed to the guardian and administrator; that sum consisting wholly of a consideration moving from the appellants. In the ascertainment and allowance of this sum, there is no evidence that the solicitor rendered any service, nor does it seem there was occasion or necessity for such service. There was no contest of the justness of the accounts, or that they formed proper matter of credit for Pittman; and there could not be occasion for the rendition of professional services in their allowance. The

[Jacoby v. Goetter, Weil & Co.]

whole theory upon which the lien is asserted, is that the balance created by the allowance of the accounts can be subjected to the payment of the general balance due to the solicitor for the services previously rendered in the case, and which are not connected with the allowance of the accounts. This is not just or equitable. Carrying into effect the equity of the appellants, from whom the consideration moved, prior in point of time to the origin of any lien which could accrue to the solicitor, is just and equitable; and it is strictly in accordance with the principle that limits the lien of an attorney or solicitor upon a judgment or decree, to compensation for services rendered, or disbursements made in obtaining it.

The decree of the chancellor is reversed, and a decree is here rendered granting relief to the appellants.

Jacoby v. Goetter, Weil & Co.

Creditor's Bill in Equity, to set aside Fraudulent Sale of Goods; also, for Receiver, and Injunction.

1. *Motion to dissolve injunction; defects in affidavit to bill.*—An injunction will not be dissolved, on motion, on account of defects in the affidavit to the bill, unless the complainant fails, when required, to verify the bill by a sufficient affidavit.

2. *Same; by defendant in contempt.*—When a defendant is in contempt, for the violation of an injunction, he can not be heard on a motion to dissolve the injunction, until he has purged the contempt.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by Goetter, Weil & Co., a mercantile partnership doing business in the city of Montgomery, against M. H. Jacoby and Mark Weis; and sought to set aside, on the ground of fraud, a sale of a stock of goods by said Jacoby to said Weis. The complainants were creditors of said Jacoby, for the price of goods sold and delivered, for which they held his several promissory notes, dated May 6th, 1882, and payable in July, August, October, November, and December next after date; and they alleged that, on the 13th November, he sold his entire stock of goods, on a simulated consideration, for the purpose of hindering and defrauding his creditors, to said Mark Weis, who had knowledge of his fraudulent intention, and participated in it. The bill prayed that the sale might be declared fraudulent and void, as against the

[Jacoby v. Goetter, Weil & Co.]

complainants, and the stock of goods subjected to the payment of their debt; and that a receiver might be appointed to take charge of the goods, and to dispose of them under the order of the court. By an amendment of the bill, which purports to have been filed by leave of the court, an injunction was prayed, to restrain the defendants, or either of them, from disposing of any of the goods. The affidavit to the bill was made by one of the complainant's solicitors, and was made before the chancellor himself in vacation, on the motion for an injunction; but the record does not show when the bill was filed, when the amendment was allowed, or when the affidavit was made. An answer was filed by each of the defendants, under oath (though oath was waived), denying the charges and allegations of fraud, and alleging that the sale was made in good faith, and on an adequate consideration; and they afterwards submitted a motion to dissolve the injunction, for want of equity in the bill, on account of the insufficiency of the affidavit, and on the denials of the answer. This motion was heard before the chancellor in vacation, and was by him overruled; and his decree overruling it is now assigned as error.

STALLWORTH & BURNETT, and JNO. GAMBLE, for appellants. The affidavit to the bill was substantially defective, being made on information and belief only, and not by one of the complainants in person.—*Railroad Co. v. Huse*, 5 W. Va. 579; *Pullen v. Baker*, 41 Texas, 419; *Smith v. Insurance Co.*, 2 Tenn. Ch. 631. On the hearing of the motion to dissolve, the chancellor had no right to look at anything outside of the bill and answer (Code, § 3879; *Barnard v. Davis*, 54 Ala. 565); and since the decree does not show that he acted on the complainants' suggestion, it is to be presumed that he did not consider it. On the full and positive denials of the answer, the injunction ought to have been dissolved.—*Saunders v. Cavett*, 38 Ala. 51; *Brooks v. Diaz & Co.*, 35 Ala. 599; *Mallory v. Matlock*, 10 Ala. 595; *Long v. Brown*, 4 Ala. 622; *Williams v. Berry*, 3 Stew. & P. 284.

FARNHAM & ROBB, *contra*.—The appellants had no right to be heard, on a motion to dissolve the injunction, while they were in contempt. If the facts were true, on which the motion to dissolve was based, the appellants mistook their remedy. *Jones v. Ewing*, 56 Ala. 360.

STONE, J.—This cause was submitted on briefs near the close of the last term, and we were not informed it was a preferred case. Had we been so informed, it would have been

[Jacoby v. Goetter, Weil & Co.]

decided during that term, in obedience to the statute.—Code of 1876, § 3922.

The present appeal is from an interlocutory decree of the chancellor, refusing to dissolve the injunction, which was moved for on several enumerated grounds. First, want of equity in the bill. There can be no question that the bill contains equity.—Code of 1876, §§ 3846–7. Second, because the affidavit to the bill is insufficient. This is no ground for dissolving an injunction, unless the complainant, upon being ruled thereto, fails to verify his bill by a sufficient affidavit.—*Jones v. Ewing*, 56 Ala. 360.

The third ground urged for dissolving the injunction is, that the answers deny every material averment of fact, on which the equity of the bill is made to rest. Against this, it was urged by complainant, that defendant Weis was in contempt by violating the injunction, and therefore could not be heard on his motion to dissolve, until he purged himself of the imputed contempt. Such is undoubtedly the law, if the facts exist as alleged.—1 Danl. Ch. Pr. 504–5; *Ib.* 806; 2 *Ib.* 1683. The papers showing the alleged contempt are not found in this record. The chancellor, in his decree refusing to dissolve, employs this language: “The complainants, in opposition to such motion, suggested that the moveants are in contempt of the court, and offer the papers on file in the cause, showing the affidavit before the register, the order of the register, the writ of attachment issued by the register, and the indorsement thereon, tending to show that they have disobeyed the injunction which they now move to dissolve.” The proper construction of this language is, that the papers on file showed the affidavit made before the register, the order of the register thereon, the writ of attachment [for contempt] issued, and the indorsement thereon, we infer, of the sheriff’s return. This, at least, shows a *prima facie* case of contempt, and disabled the moveants to have a hearing on their motion to dissolve, based on the denials in the answer.

If the papers on file did not show what the chancellor recites they did, they should have been incorporated in the record, to enable us to pass on their sufficiency.—*Tillman v. Spann*, 68 Ala. 102.

The decree of the chancellor is affirmed.

[Kennedy Brothers v. Mobile & Girard R. R. Co.]

Kennedy Brothers v. Mobile & Girard Railroad Co.

Action against Common Carrier for Loss of Goods.

1. *Liability of railroad company as common carrier, and as warehouse-man.*—When a railroad company receives goods for transportation, safely transports them to the point of destination, informs the consignee of their arrival, and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier are at end; and if the goods are then left in its custody, its liability for a subsequent loss or damage is that of a warehouse-man only.

2. *Variance.*—In an action against a railroad company as a common carrier, for the loss of goods, the complaint being in the form prescribed by the Code (Form No. 13, p. 703), a recovery can not be had on proof of a loss which occurred after the defendant's duty and liability as a carrier had terminated, and while the goods had been left in its custody as a warehouse-man.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

GARDNER & WILEY, for appellants, cited Redfield on Railways, vol. 2, p. 82.

JAS. T. NORMAN, *contra*, cited *M. & G. Railroad Co. v. Prewitt*, 46 Ala. 63; *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209; 24 Amer. Dec. 147–8, cases cited in note.

BRICKELL, C. J.—The complaint contains a single count, in the form prescribed by the Code, claiming damages of the defendant for a failure to deliver certain goods, which it had received as a common carrier for transportation and delivery to the consignees of the plaintiffs, at the city of Troy in this State. The uncontroverted facts shown in evidence on the trial in the Circuit Court are, that the goods were safely transported to Troy, the point of destination, and the consignees informed of their arrival; they giving a receipt for them, and making payment of the freight, but, not having a place to store them, the goods were left in the care and custody of the defendant; and if any loss occurred, it occurred after the taking of the receipt and the payment of freight, and after the request that they should remain in the custody of the defendant.

A complaint, like a declaration at common law, should state
VOL. LXXIV.

[Kennedy Brothers v. Mobile & Girard R. R. Co.]

the facts necessary to constitute the cause of action, clearly and intelligibly; and the evidence in support of the plaintiff's right of recovery must correspond to its averments. There can be no recovery upon a cause of action, however meritorious it may be, or however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff.—1 Chit. Pl. 2711. It is well settled, that when a common carrier safely transports goods to the point of destination, informs the consignee of their arrival, and affords him reasonable opportunity for their removal, his relation, duty, and liability as a carrier terminate; and if subsequently the goods remain in his custody, his liability is that of a bailee for deposit or storage,—as usually designated, that of a warehouse-man. He is bound only to common care and diligence, and liable only for the want of such care and diligence.—*Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *Mobile & Girard R. R. Co. v. Prewitt*, 46 Ala. 63; Hutchinson on Carriers, § 356. The concurrence of all these facts may not be necessary to the termination of the carrier's duty and liability; we state them now, because in this case the evidence of their concurrence is undisputed. Having kept and performed its contract and duty as to the transportation of the goods—having carried them to the point of destination, informed the consignees of their arrival, afforded opportunity for their removal, and subsequently retaining custody of them to await the convenience of the consignees—it would be manifestly unjust, if the defendant could be charged as an insurer; charged with the extraordinary liability of a carrier, for a loss subsequently occurring. That duty and liability had terminated; and if the evidence tends to show a loss of the goods, and a consequent liability upon the defendant, it is variant from the allegations of the complaint; it is not because of a violation of the duty therein stated that a liability arises. In no event, could the plaintiff recover under this form of complaint; and if there is error in the giving or refusal of the instructions, to which exceptions were taken, the error is without injury, and is not matter for reversal.

Affirmed.

Graham v. Myers & Co.**Graham v. Ligon.***Statutory Actions in nature of Detinue, for Cotton Bales.*

1. *Who may maintain action.*—To maintain the action of detinue, or the corresponding action for the recovery of personal property *in specie*, the plaintiff must have the legal title, and a right to the immediate possession of the entire chattel sued for.

2. *Against whom action lies.*—The action does not lie against a person who was not in possession of the chattel at the commencement of the suit.

3. *When action lies for money had and received; amendment of complaint.*—Under the common money counts, a recovery can not be had for the proceeds of cotton sold after the commencement of the suit, although they were added to the complaint by amendment subsequent to the sale.

APPEALS from the Circuit Courts of Talladega and Cleburne.
Tried before the Hon. LEROY F. BOX.

These two cases, though decided together, were argued and submitted on different days. Each was a statutory action for the recovery of several bales of cotton, in which J. R. & J. F. Graham, suing as partners, were plaintiffs; and in each case they claimed the cotton under a mortgage executed to them by J. R. Mitchell, which was dated April 12th, 1879, and purported to be given for necessary supplies advanced and to be advanced to him, to enable him to make a crop during the year 1879. The action against Myers & Co. was commenced on the 5th January, 1880, and sought to recover five bales of cotton. As to these bales, J. F. Graham, one of the plaintiffs, testifying as a witness for them, stated that, "on the Saturday before he brought this suit, witness came to the railroad depot at Talladega (E. T., Va. & Geo.), in company with John Ingram, and found said cotton in a car, and took it out of the car, and placed it in the depot in charge of one W. L. Terry, and instructed him to hold said cotton as J. R. & J. F. Graham's agent, until such time as he (witness), or some one authorized by said J. R. & J. F. Graham, should demand said cotton of him; that on the next Monday morning, while the cotton was still in the possession of said Terry under said instructions, he commenced this suit for said J. R. & J. F. Graham against Myers & Co., and had the writ levied on said cotton so in the possession of said Terry." On these facts, the court charged

[Graham v. Myers & Co.]

the jury, "that if they believed, from the evidence, that J. F. Graham, one of the plaintiffs, took the cotton in controversy into his possession on Saturday, and put it in the depot in charge of another person for him, and that on the following Monday morning, while the cotton was thus held, the plaintiffs commenced this suit, then the plaintiffs can not recover." The plaintiffs excepted to this charge, and they here assigned it as error, with other rulings which require no notice.

The suit against Ligon was commenced on the 1st January, 1880, and sought to recover six bales of cotton; but only one bale was seized by the sheriff under the writ, the other five bales having been removed by the defendant; and these five bales, which were the same bales involved in the suit against Myers & Co., he sold to said Myers & Co. on the 3d January, 1880. Counts in debt for the money arising from the sale, or one half thereof, were added to the complaint by amendment. The defendant pleaded *non detinet*, and a special plea setting up the verdict and judgment in favor of Myers & Co.; and the cause seems to have been tried on issue joined on these pleas. The plaintiffs claimed the cotton under the same mortgage from J. R. Mitchell; and it was proved that the cotton was raised by said Mitchell during the year 1879, on lands belonging to said Ligon, under a contract between them by which they were to be equally interested in the cotton raised. The crop raised consisted of ten bales, part of which was delivered by said Mitchell to plaintiffs' agent while at the gin, being about six bales, and the same here sued for; but there had never been any division of the cotton between Mitchell and Ligon, nor any settlement of accounts between them, so far as the evidence showed. The plaintiffs requested the court to charge the jury, among other things, as follows: "If the jury believe, from the evidence, that Mitchell executed the mortgage to plaintiffs which had been read in evidence, on the crop to be grown by him during the year 1879, and delivered to plaintiffs the cotton now sued for; and that said Ligon afterwards took five bales of said cotton, and sold the same, and received the money for the same,—then plaintiffs are entitled to recover one half of said proceeds of sale, with interest thereon from the time Ligon received the money." The court refused this charge, and the plaintiffs excepted; and they here assigned its refusal, with other matters, as error.

J. H. SAVAGE, and AIKEN & MARTIN, for appellants.

HEFLIN, BOWDEN & KNOX, and PARSONS & PARSONS, *contra*.

[Graham v. Myers & Co.]

STONE, J.—These two causes, although originating and tried in different counties, are so intimately connected, that we will consider them together. The ownership of six—the same six—bales of cotton, is the subject of each suit. Each of the actions is for the recovery of personal property in specie, corresponding to the common-law action of detinue.

The cotton in controversy was grown in the year 1879, on the lands of Ligon, by the labor of one Mitchell. The crop was cultivated, grown and gathered, under an agreement that Ligon should furnish the lands, team and farming implements, and Mitchell should furnish the labor. Ten bales of cotton were produced, of which six are involved in the suit against Ligon, and five of the same six in the suit against Myers & Co. There had been no division, or separation of the shares of the joint owners, Ligon and Mitchell. On the 12th of April, 1879, Mitchell conveyed by mortgage the crop he was to grow and produce that year to J. R. & J. F. Graham, as security for supplies advanced, and to be advanced by them. There is testimony in the records tending to show, that under this contract Mitchell became indebted to the Grahams about three hundred dollars. The mortgage was recorded in due time in Cleburne county—the county in which Mitchell resided, and in which the cotton was grown.

As we have said, each of these suits is a statutory action in detinue. The one against Ligon was instituted January 1st, 1880, and the one against Myers & Co., January 5th, 1880. Under the most favorable view for the plaintiffs which can be taken, their claim was but an undivided, unsevered interest in the cotton. This will not support the action of detinue. 1 Brick. Dig. 572, § 6; *Smith & Co. v. Rice*, 56 Ala. 418. To maintain that action, the plaintiff must have the legal title to, and a right to the immediate possession of the entire thing.

Another insurmountable obstacle in the way of a recovery against Myers & Co. is, that they were not in possession of the property when the action was brought. According to the testimony of one of the plaintiffs, the cotton was in his possession when he instituted this suit.—1 Brick. Digest, 573, §§ 28, 29; *Gilbreath v. Jones*, 66 Ala. 129; *Lightfoot v. Jordan*, 63 Ala. 224; *Henderson v. Felts*, 58 Ala. 590.

The complaint in the suit against Ligon was afterwards amended, by adding common counts in debt, for money had and received. It will be remembered that this action was instituted January 1st. The proof is that the cotton was not sold until after that time. So, when the action was brought, defendant had received no money, to which plaintiffs could assert any claim. There can be no recovery on these counts.—*Burns v. Campbell*, 71 Ala. 271.

[Coleman v. Siler.]

We have thus shown that the plaintiffs can not recover in either of these actions, and we need not consider any of the special rulings. They did, and could do plaintiffs no harm.

Each of the judgments must be affirmed.

Coleman v. Siler.

Special Action on the Case, by Landlord, against Purchaser of Tenant's Crop with Notice of Lien.

1. *Waiver or abandonment of landlord's lien for rent.*—The landlord's lien on his tenant's crops, for rent, is not waived or impaired by taking the tenant's note with personal security; neither is it waived or abandoned by his consent to the removal of the crops from the premises.

2. *Agreement construed, as to conflicting claims of landlord and merchant making advances.*—Under a written agreement between a landlord, claiming a statutory lien on his tenants' crops for rent and advances, and a merchant claiming a statutory lien for advances, by which it is stipulated that P., the merchant, "is to get today three bales of cotton (two from Henry, and one from Nathan), *less the rents*, and out of the next lot of said Henry and Nathan S. [landlord] is to get two-thirds, provided it does not exceed their indebtedness to him for the year 1881, and so on until both claims are settled;" the lien for rent is expressly reserved and retained on the three bales delivered to the merchant, and the landlord's lien for advances is, by necessary implication, abandoned as to those bales; while, as to the residue of the bales raised by the tenants named, two-thirds thereof is made subject to his claim for rent and advances, but only during the year 1881.

3. *Parol agreement varying writing.*—The terms of a written agreement can not be varied by proof of a contemporaneous verbal agreement, though a subsequent verbal agreement might be proved.

4. *Waiver of landlord's lien for advances.*—When a landlord agrees and promises, by letter addressed to a merchant, not to make any advances to his tenants if the merchant will furnish them with supplies, this necessarily postpones and subordinates his lien for any advances afterwards made to them, to the merchant's lien for advances made on the faith of the letter; and in a controversy between him and a purchaser from the merchant, he can not claim to appropriate any part of the proceeds of sale of the tenant's crop to his lien for such advances, until the merchant's lien is fully paid and satisfied.

5. *Sale by agent.*—Authority to an agent to sell personal property, only authorizes him to sell for money; and if he sells in satisfaction of his own debt, no rights are conferred or acquired by the sale, but he and the purchaser are guilty of a joint conversion.

6. *Variance.*—Under a complaint claiming damages for the defendant's sale and conversion of a crop raised on rented lands, with knowledge of plaintiff's statutory lien as landlord for rent, whereby the lien was destroyed and lost, a recovery can not be had on proof of a statutory lien for advances.

7. *Witness; effect of testimony, as against party introducing.*—As a general rule, a party can not impeach the general reputation or credibility of a witness introduced by him; yet it can not be asserted, as matter

[Coleman v. Siler.]

of law, that the testimony of a witness must always be taken most strongly against the party by whom he was introduced.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Q. P. Siler, against W. S. Coleman and J. S. Carroll, to recover damages for an alleged sale and conversion by the defendants of four bales of cotton, grown on rented lands belonging to the plaintiff, and on which he claimed a statutory lien for rent, whereby said lien, of which he alleged the defendants had notice, was lost and destroyed; and was commenced on the 21st March, 1882. The complaint alleged that the four bales of cotton were grown, during the year 1881, by Sharper McKee, Henry Williams, and Nathan Austin, on lands rented to them by the plaintiff for that year, at the stipulated rent of one-third of the cotton, and one-fourth of the corn raised. The record does not show what pleas were filed; but the cause was tried on issue joined, and there was a judgment on verdict for the plaintiff, for \$134.27.

The plaintiff, testifying as a witness for himself on the trial, as the bill of exceptions shows, stated the terms of the contract for rent as alleged in the complaint, and further testified, that said Nathan, Henry and Sharper had rented the same lands from him for the year 1880; that Nathan failed to discharge his indebtedness for advances that year by \$52.38, which balance was carried forward into his account for 1881; that Henry failed to pay his entire indebtedness for that year, and left a balance of \$5.36 unpaid, which was carried forward into his account for the next year; "that he had made advances, during the year 1881, \$60.05 to Sharper, \$29.50 to Nathan, and \$29.25 to Henry; that he had been paid all amounts due him for rent and advances, except \$58.75 for advances, and \$79.58 for rent, making in all \$138.33." He also stated, on cross-examination, "that he had received from said tenants, out the crop of 1881, two bales of cotton from Henry, one bale from Nathan, and one from Sharper; that he had also received, in cotton, \$40.15, and \$36.26, besides \$20.38 in money; that defendants had also paid him some money, but he could not say how much, and Pennington & Co. had paid him some money, but he could not say how much." He testified also, on cross-examination, "that Sharper McKee continued his tenancy during the year 1882, and being asked if said Sharper did not, out of the crop of 1882, pay him the entire balance due for rent and advances the previous years, replied, that he did not know—that Sharper had paid him a few dollars, but he did not know how much." Said Sharper, being afterwards introduced as a witness by the plaintiff, testified that, at the expiration of the year 1882, "he had

[Coleman v. Siler.]

a final settlement with plaintiff, and paid him all amounts which he owed him, on rents and advances, for the previous years."

The four bales of cotton which the defendants had received and sold, were bought by them from J. A. Pennington, or Pennington & Co., who held crop-lien notes and mortgages for advances made by them, during the year 1881, to said Sharper, Nathan, and Henry; and it was proved that, of these four bales, two were raised by said Henry, and one by said Nathan, but the evidence was uncertain as to the fourth bale. It was not denied that said defendants and Pennington each had notice that these bales were raised by said tenants on lands which they had rented from the plaintiff: but said Pennington testified as a witness for the defendants, "that he refused to make any advances to said tenants, unless plaintiff would obligate himself not to furnish them anything during said year 1881;" that the plaintiff thereupon sent him a letter to that effect, which was produced and read in evidence; and that he afterwards furnished supplies to said tenants, taking crop-lien notes and mortgages as security, on the faith of that letter. The letter was dated January 26th, 1881, and in these words: "By request of the tenants on my Oak Grove place, I hereby state to you, that I will not advance anything to them this year; I mean Sharper McKee, Harvey Austin, Nathan Austin, and Henry Williams. I do this freely. I did not know you wanted me to say this, or I should have stated in the note I wrote you in regard to the terms of rent agreed on between us."

The witness Pennington further testified, "that when the crops of said tenants were made, and were being brought to market, he learned that plaintiff was claiming against each an amount for advances, in addition to rent, and that his lien was superior to that of witness, and that he must be paid for such advances, as well as rents, before witness was paid anything; that this caused a disagreement between him and the plaintiff, which was settled by an agreement in writing." This agreement, which was produced and read in evidence, was signed by plaintiff and said Pennington & Co., was dated September 22d, 1881, and in these words: "We both agree to the following agreement: that J. A. Pennington is to get three bales of cotton (two from Henry Williams, and one from Nathan Austin) to-day, less the rents; and out of the next lot of said Henry and Nathan, Q. P. Siler is to get two-thirds, provided said two-thirds does not exceed their indebtedness to him for the year 1881; and so on, until both claims of said Pennington and Siler are settled." Said witness testified, also, "that after said agreement was entered into, as above stated, plaintiff turned over to him the warehouse receipts for the three bales of cotton, and he

[Coleman v. Siler.]

turned them over to the defendants; that it was further agreed between them, at the same time, that witness was to receive the cotton of said McKee, Austin and Williams, and was to sell the same, and leave plaintiff's share with said defendants; that he did sell such of the cotton of said tenants as came to his possession, and left the money for plaintiff's share, except one heavy bale, which he delivered to plaintiff through one Ben. Smith, and \$20.65 in money which he paid to plaintiff; that he sold said three bales to defendants, and left plaintiff's share with them; that the manner of all the sales was thus: defendants took the cotton at market price, and credited witness with the amount, or applied it to the payment of witness' indebtedness with them previously contracted; that the fourth bale, which weighed 472 lbs., and which was also covered by said agreement of September 22d, was afterwards received by him, and was sold to said defendants, and plaintiff's share left with them; and that he had not been paid, out of the crops of said tenants or otherwise, the amount advanced by him to them."

These being the material facts, though there was other evidence introduced by each party, the court charged the jury, among other things, "that if the defendants bought the cotton from Pennington, and paid for it by giving him credit on a previously subsisting debt due to them from him, then they would not be purchasers for value in this case, and would not be protected thereby, if otherwise liable;" also, "that the contract of September 22d did not affect the lien of either plaintiff or said Pennington, but only regulated the proportion and manner of payment between them;" and "that, if plaintiff made advances to each of said tenants, and they made payments to him, but did not direct the application of said payments, then plaintiff had the right to apply said payments to the advances due to him; and if he did so apply them, and they did not discharge said debt for advances, then defendants are liable for the value of plaintiff's rents, to the extent of the cotton received by them with notice of said tenancy."

The defendants excepted to each of these charges, and then requested eighteen separate charges, which were in writing, and each of which was refused by the court, exceptions being duly reserved to the refusal. Among the charges so refused were the following:

1. "When a party introduces a witness, and has him sworn and examined, he thereby indorses such witness as credible; and if Sharper McKee, plaintiff's witness, testified that he had paid plaintiff all he owed him both for rent and advances, including balances for the year 1881, this evidence must be taken most strongly against the plaintiff; and if the jury are reasonably satisfied that said Sharper has paid such rents and advances,

[Coleman v. Siler.]

this takes Sharper's crop out of the case, and they must then look, in determining the question of indebtedness, to the two remaining tenants, Austin and Williams; and if the jury believe, from the evidence, that their indebtedness for the year 1881 was paid, then, under the written contract in evidence, they must find for the defendants."

2. "That the written contract of September 22d must determine the liability of the defendants; that, by that contract, plaintiff and Pennington both waived their liens, and undertook and agreed to divide the crop of cotton of said Austin and Williams between themselves, and, having done this, plaintiff can not recover against defendants in this action."

3. "If the jury believe, from the evidence, that plaintiff directed Pennington to sell the cotton, and to leave his portion of the rents with defendants, and that Pennington did so, then such amounts, so left with defendants in pursuance of such instructions, were payments *pro tanto*, whether defendants paid them to plaintiff or not."

4. "If the jury believe, from the evidence, that the defendants bought said cotton from Pennington, and that Pennington had authority to sell it, then they must find for the defendants."

5. "Under the agreement or contract of September 22d, the jury can not consider any indebtedness of Austin and Williams for the previous year, namely, 1880."

6. "If the plaintiff has been paid for the rents, for which he seeks to recover in this suit, then he is not entitled to recover, and it makes no difference whether Sharper McKee paid a portion of it; and if, taking into account the amount paid by said Sharper, if any thing, the jury are unable to determine the amount really due on account of rent or advances, or both, from the other tenants, then they must find for the defendants, provided Sharper has paid in full."

7. "Before plaintiff can recover in this suit, he must show that something is due him for rent, and must show the amount with reasonable certainty."

The charges given, and the refusal of the several charges asked, are now assigned as error.

GARDNER & WILEY, for appellants.

M. N. CARLISLE, *contra*.

SOMERVILLE, J.—There seems to have been a needless multiplicity of instructions demanded of the court by the appellant's counsel, in the trial of this cause below, especially in view of the very few elementary principles which, in our judg-

[Coleman v. Siler.]

ment, should have controlled the decision of the jury in forming their verdict.

The action is one on the *case*, brought by Siler, as landlord, claiming damages for the loss or destruction of his lien for *rent* on four bales of cotton, purchased and shipped by defendants with a knowledge of plaintiff's lien. The defendants claimed as purchasers from one Pennington, who held a mortgage or crop-lien upon the cotton, executed to him by the lessees, or tenants. It is not denied that both the mortgagee and the defendants had notice of the plaintiff's lien. This seems to have been conceded throughout the progress of the trial. It is contended, however, that there was a *waiver*, or abandonment of the landlord's lien; and this is the controlling point of controversy in the case.

Whether such a lien is waived, or not, is chiefly a question of intention, to be determined, like other questions of fact, by the circumstances of each particular case. This court has held, that such a lien is not impaired, as a vendor's lien would in like case presumptively be, by the landlord's taking from the tenant a note with *personal security* for the payment of the rent. *Denham v. Harris*, 13 Ala. 465. Neither, as expressly adjudged, will the mere consent of the landlord to the *removal* of the crops from the premises, without more, operate as a waiver.—*Tuttle v. Walker*, 69 Ala. 172. Before the law will authorize such intention to be inferred, the rule is, that it must be made obvious by plain proof.

What may have been the effect of the plaintiff's letter written to Pennington, on January 26th, 1881, in which he obligated himself not to furnish advances to his tenants if Pennington would furnish them,—so far, at least as it immediately concerns the four bales of cotton in controversy—we need not just here decide. This was a matter of contention between them, which was intended to be settled by their subsequent written agreement, made in September, 1881,—a proper construction of which must chiefly determine the relative rights and conflicting priorities of the parties litigant.

It is shown that the plaintiff originally had a claim against his tenants, not only for rent, but also for advances made under the provisions of the statute.—Code, 1876, § 3467. These advances, not less than the rent, constituted a lien in favor of the plaintiff upon the crops grown on the rented premises, each equal in dignity to the other, unless there was some fact which would operate as a loss, waiver, or abandonment of this statutory right.—*Wilson v. Stewart*, 69 Ala. 302. The main question is, how far this result was effected by the written agreement executed in September.

The clear purpose of this agreement was to modify, and, to

[Coleman v. Siler.]

some extent, abate the claims of the plaintiff, as secured to him by the statute. It was stipulated, that Pennington was to get, in the first place, *three* bales of cotton, two of which were to be delivered by the tenant Williams, and the other one by Austin, on that day; and it was agreed that he was to take these three bales, "*less the rents.*" We construe this to mean, *subject to the lien of the RENTS* as such, and not the advances. In view of the controversy previously existing between the parties, as to the relative priority of their respective claims for *advances*, it is obvious that the retention specifically of a lien for rent, *eo nomine*, is an exclusion of that for advances on *these particular three bales of cotton*. The maxim obviously applies, *Expressio unius est exclusio alterius*.

The evidence, we repeat, tends to show that these three bales of cotton went into the hands of the defendants, with full knowledge of plaintiff's lien.

The agreement under consideration, in the next place, makes provision as to the *remainder* of the cotton to be received from the same two tenants, Williams and Austin. It makes no reference to any other cotton, such as might be received, if any, from McKee, or the other tenant. *Two-thirds* of this remainder only is made subject to plaintiff's lien, and this is limited to rent and advances for the *year 1881*; or, in other words, to the indebtedness of these tenants for advances made during this year, and any balance of the entire rent which might remain unsatisfied by the three bales of cotton first mentioned.

If McKee owed the plaintiff any advances, such indebtedness would not fall within the influence of this agreement, in whatever particular year these advances may have been made. Nor would the agreement itself embrace any indebtedness held by plaintiff against his tenants for any other year than 1881. Nor, again, would parol evidence be admissible, to show a *contemporaneous* agreement of the contracting parties that such should be the case, although a *subsequent* verbal agreement might be proved, which would have this effect. It does not appear, however, that any one of the four bales of cotton in controversy was raised by McKee. The evidence tends to show that they were all covered by the stipulations of the written agreement.

It is insisted as a defense to this action, that the complaint declares only upon the lien for *rent*, and that the rent was paid. The argument is, that plaintiff's lien for rent, at least on the cotton grown by McKee, was superior to his lien for advances, and that he was compelled to appropriate all cotton received from McKee to the satisfaction of this superior lien. This aspect of the case requires us to construe the effect of plaintiff's letter to Pennington, in which he agreed not to ad-

[Coleman v. Siler.]

vance to McKee and the other tenants, if Pennington would do so. This letter has no bearing on that portion of the cotton received from Williams, or from Austin. That is governed by the subsequent agreement of September 22, 1881, to which we have above alluded.

The clear effect of the *letter* in question was to *subordinate*, or postpone, the plaintiff's lien for *advances*, to any advances made by Pennington on the faith and strength of its assurances. It conferred on Pennington, in other words, a priority of lien for his *advances*, over the *advances* made by the plaintiff for the same year—1881. The agreement of September modified this priority of lien, only so far as it affected the cotton received from Williams and Austin. It did not modify, or limit it, so far as it attached to, or concerned the portion of the crop received by plaintiff from McKee. This, as we have said, must rest upon different grounds, because it is not covered by the stipulations of the September agreement. We are of opinion that the plaintiff was precluded from appropriating any portion of the cotton raised by McKee to the satisfaction of his claim for advances made in the year 1881, until Pennington's claim for advances, made the same year, was fully satisfied.

The rulings of the court are not in harmony with the foregoing views, as is clearly apparent from the refusal of several charges requested by the appellant's counsel.

It is almost needless to add, that the authority given by plaintiff to Pennington, to sell certain cotton to the defendants, was an authority to sell only for *money*, or *cash*. It gave no authority to appropriate the cotton in satisfaction of his personal debts due to the defendants. When he undertook to do this, he and the defendants were guilty of a joint conversion of the plaintiff's property, and no title to the cotton was conferred by the one wrong-doer, or acquired by the other. It is well settled, that no special agent, who is authorized to sell, can pay his own debts with the property of the principal.—*Burks v. Hubbard*, 69 Ala. 379; *Benj. on Sales*, § 742.

It appears from the pleadings in the case, that the plaintiff claims a lien based only on a debt due him as *rent*. The evidence tends to show that a part of the sum claimed was for *advances*; and although the lien of the two is of the same dignity, because made so by the statute when due to the landlord, yet the one is essentially distinct from the other, and the matter of description is material. Notice of the relation of landlord and tenant, for example, operates as constructive notice of rent, but not of advances.—*Wilson v. Stewart*, 69 Ala. 302. Where the plaintiff declares upon a lien for rent, he can not recover upon one for advances. The variance would be fatal, and the court erred in refusing to so charge the jury.

[East Tenn., Va. & Geo. R. R. Co. v. Clark.]

It is a general rule, liable to some exceptions, that when a party introduces a witness in proof of his case, he represents him as being worthy of belief, and the law will not permit him afterwards to impeach the witness' general reputation for truth, or to impugn his credibility by general evidence tending to show him to be unworthy of belief.—1 Greenl. Ev. § 442. But it can not be said, as matter of law, that, in all cases, the testimony of a party's own witnesses must be always taken most strongly against him. The witness may exhibit a degree of bias against the party offering him, and of manifest partiality for the adversary party, such as to authorize the jury to give very slight weight to his testimony, either for or against either party. The court very properly so declared the law in the present cause.

There are some other phases of the case, which we decline to consider, as they will not probably arise again upon a second trial.

The judgment is reversed, and the cause remanded.

East Tenn., Va. & Geo. Railroad Co. v. Clark.

Action to recover Damages for Personal Injuries.

1. *Contributory negligence as defense ; request for explanatory charge.*
In an action against a railroad company, to recover damages for personal injuries, a charge which states the correct rule as to negligence, but ignores the evidence tending to show contributory negligence, is not therefore erroneous ; the question of contributory negligence being defensive in its character, and properly calling for an explanatory charge.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

This action was brought by Israel H. M. Clark against the appellant, a corporation created under the laws of Alabama and Tennessee, to recover damages for personal injuries caused by being knocked down and run over by one of the defendant's trains of cars, on the night of March 26th, 1881, whereby his right hand was mashed, and so badly injured that several of his fingers were necessarily amputated ; and was commenced on the 14th March, 1882. The defendant pleaded not guilty, "in short by consent," and a special plea averring contributory negligence on the part of the plaintiff ; and issue was joined on both of these pleas. At the time the accident occurred, the

[East Tenn., Va. & Geo. R. R. Co. v. Clark.]

plaintiff was returning from Talladega to his home in Clay county, and was camping for the night, with Ben. Clemens and wife, near the railroad at "Parsons' Crossing;" he had been driving a wagon drawn by three oxen, and, in unyoking them, one of the oxen got loose, and crossed the railroad track. The plaintiff, testifying as a witness for himself, thus described the accident: "I went in pursuit of the ox, and found him 50 or 75 yards beyond the railroad, in the public road. I got the ox, and caught hold of the line on his head, and drove him back to the railroad. When I got to the railroad, I did not see the train at all, until it was right on me, and knocked me down. I saw the ox jump, and then the train run over me, and cut off my hand. I was knocked senseless, and did not know any thing more until the doctor was standing over me. After we stopped to camp, a train went down towards the depot, which had its headlight burning, and which rang the bell as it approached the crossing. The train that struck me was going north, and had no head-light burning, and did not ring the bell, nor blow the whistle, when approaching the crossing. I heard a train rattling and running just as I approached the track, but thought it was the train at the depot. I did not stop as I approached the railroad track. I did not see the train until it was right at me and knocked me down. It was dark at the time. I don't know the hour of the night when it happened. We did not stop, from the time we left the depot until we got to the said crossing. We went up there for the purpose of hunting a place to camp. It was about a half-mile from the depot." The plaintiff introduced other witnesses, who testified that, at the time of the accident, the head-light of the engine was not burning, and that the bell was not rung, nor the whistle blown, as the train approached the crossing; but the defendant's witnesses contradicted them on both of these points.

The court gave the following (with other) charges to the jury, at the instance of the plaintiff: 2. "To approach a public road crossing at night with a train or engine, without a head-light, or without ringing the bell, or blowing the whistle, as required by law, is reckless; and if the jury find, from the evidence, that the defendant did this by its servants, then they were guilty of reckless conduct; and if thereby the plaintiff was injured at such crossing, the defendant is guilty." 3. "The rights and duties of the railroad company and the plaintiff, at a public crossing, are clearly defined by law, and neither party has the right to disregard them. The railroad company is required to ring the bell, or blow the whistle, whether day or night, one quarter of a mile from the crossing, and continue to do so until the crossing is passed, and is also required to keep good lights on their trains at night; and if the jury believe,

[East Tenn., Va. & Geo. R. R. Co. v. Clark.]

from the evidence, that the plaintiff was injured while endeavoring to cross the defendant's railroad, between eight and nine o'clock at night, at a public crossing, in March, 1881, and at the time the railroad company did not have good lights on the train, as required by law, then the company was guilty of negligence; and if, by reason thereof, plaintiff did not discover the train until it was close to him, so that he could not get out of the way by the use of reasonable diligence on his part, then he is entitled to recover such damages as the evidence satisfies the jury he has sustained." 4. "Gross negligence on the part of the railroad company consists in not doing those things which the law requires it to do." 5. "The defense of contributory negligence is not made good, if the plaintiff, after contributing by his own negligence to place himself in peril, employs proper diligence to extricate himself, and the defendant neglects to use diligence which might have prevented the catastrophe." 8. "In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence; and although the jury may believe that the plaintiff was imprudent in the first instance, in getting on the track, yet, if he made all proper efforts to escape when the danger became apparent, and the servants of the railroad company failed to use all the proper means in their power, by turning on brakes, and reversing the engine, by which the danger might be avoided, the railroad company will be responsible, and such original contributory negligence, if shown, is no defense to the action. It is not essential for the plaintiff to show that the engineer perceived the obstruction, if it is shown that he or his steer, or both, were on the track, and could have been seen by the exercise of due diligence, with proper head-light." The defendant excepted to each of these charges, and now assigns them as error.

PETTUS & DAWSON, with whom was D. T. CASTLEBERRY, for the appellant.—The second and third charges each ignore the question of contributory negligence on the part of the plaintiff in getting into danger—in failing to listen and look before he went on the track; and the second also makes the failure to ring the bell, in such case, negligence *per se*.—*Railroad Co. v. Copeland*, 61 Ala. 376; *Tanner v. Railroad Co.*, 60 Ala. 638. The fourth charge is erroneous, in making the failure to do any thing required by law of a railroad company gross negligence. The fifth charge does not state at what stage the defendant's negligence must have occurred, to make it liable. Was it before the plaintiff was in peril, or was it after the engineer discovered, or could have discovered his peril?—*Tanner v. Railroad Co.*, 60 Ala. 638. The eighth charge omits to re-

[Flourney & Epping v. Owens.]

quire the plaintiff, after negligently getting on the track, to use diligence in discovering his peril, and allows him to remain negligently on the track until his danger became apparent, if he was diligent after he had discovered his peril. This charge is erroneous, also, in defining the duties of the railroad. On the facts stated, the engineer might not have been guilty of negligence.

PARSONS & PARSONS, *contra*, cited *S. & N. Ala. Railroad Co. v. McLendon*, 63 Ala. 266; *Farley v. Smith*, 39 Ala. 38; *Cook v. Central R. R. Co.*, 67 Ala. 533; *Tanner v. L. & N. Railroad Co.*, 60 Ala. 621; *Gothard v. Ala. Great So. Railroad Co.*, 67 Ala. 114; *M. & C. Railroad Co. v. Copeland*, 61 Ala. 376.

STONE, J.—In the argument of counsel it is contended, that the Circuit Court erred in giving each of the charges numbered 2, 3, 4, 5, and 8. We do not think there is reversible error in either of these charges. If there was evidence tending to show contributory negligence (we do not decide there was such evidence), that would present a phase of the question defensive in its character, and, at most, would call for an explanatory charge. To put the court in error, such charge must be asked by the party who conceives himself aggrieved by the court's rulings. These principles have been so often declared, that it is needless to cite authorities, other than those noted on the brief of counsel.

The judgment of the Circuit Court is affirmed.

Flourney & Epping v. Owens.

Garnishment on Judgment.

1. *Wife's earnings, commingled with funds belonging to statutory estate; not reached by garnishment against borrower.*—When a promissory note is taken for money loaned, whether payable to the wife directly, or to the husband as her agent, a creditor of the husband can not reach and subject any part of the debt, by garnishment against the maker of the note, because a part of the money arose from the separate earnings of the wife, and were mingled with other moneys belonging to her statutory estate.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN D. HUBBARD.

VOL. LXXIV.

[Flournoy & Epping v. Owens.]

The appellants in this case, suing as partners, recovered a judgment in said court, on the 18th April, 1882, against W. T. Owens and others; and sued out a garnishment on it against J. F. & W. C. Cameron, as the debtors of said Owens. The garnishees appeared, and filed an answer, denying any indebtedness; but their answer was contested by the plaintiffs, and an issue was thereupon made up between them. On the trial of this issue, as the bill of exceptions shows, the garnishees were examined on oath by the plaintiffs, and stated that, "in the spring of 1882, they obtained \$200 from said W. T. Owens, at different times, and in separate amounts, for which they executed two promissory notes, each for \$100, one payable to Mrs. Sallie Owens, wife of said W. T. Owens, and the other to said W. T. Owens as agent of Sallie Owens; and that the said W. T. Owens stated, at the time he let them have the money, that it belonged to his wife." Mrs. Owens, being examined as a witness on the part of the garnishees, testified, among other things, "that in August, 1879, she and her husband had agreed that all the money she could make by her labor, and from keeping boarders, was to belong to her, and be her property; that she made as much as \$300 or \$400 by keeping boarders, making about \$25 per month, and as much as \$25 or \$30 by selling milk; that the money so made by her was kept separate from her other money, which belonged to her separate estate, until it amounted to ten or twenty dollars, and was then sometimes mixed with her other moneys; that the money loaned to the garnishees may have been taken from the funds sometimes so mixed, but some of the several amounts loaned were not mixed; that the money loaned was hers, and was taken to reimburse her estate for money used by her husband, unless it was such part thereof as was her statutory estate, as she had money loaned out in small sums which belonged to her statutory estate, and when collected, as it often was, it was loaned out again; and that some of the money loaned to the garnishees, as she recollected, was so collected and loaned." W. T. Owens testified also, in behalf of the garnishees, substantially the same as Mrs. Sallie Owens. There was other testimony in the case, as to the amount of property which Mrs. Owens held as a statutory estate, the amount of her money which her husband had received and used, and the value of property which he had conveyed to her; but these matters are immaterial, as the questions involved are not decided by this court.

The court charged the jury, "that if they believe the money loaned was the proceeds of a boarding-house, and Mrs. Owens took it to reimburse herself, at the instance of her husband, for moneys of hers which had been used by him, and not paid or accounted for to her, then the garnishees are not liable, un-

[Flournoy & Epping v. Owens.]

less there was fraud in the transaction." The plaintiffs excepted to this charge, and requested the following charges, which were in writing: 1. "If the jury find, from the evidence, that the money acquired by the wife's earnings was mixed by her with moneys belonging to her separate estate, so that it could not be distinguished, and said money had not been turned over to her to reimburse her for money which her husband owed her, and the money loaned was from the funds so mixed,—then the jury must find for the plaintiffs." 2. "If the jury find, from the evidence, that the money acquired by the earnings of the wife was mixed and mingled by her with moneys belonging to her separate estate, and that she was not able to identify the one from the other; and if the money loaned was taken from the funds so mixed, and it could not be identified,—then the plaintiffs are entitled to recover." The court refused each of these charges, and the plaintiffs excepted to their refusal.

The charges given by the court, and the refusal of the charges asked, are now assigned as error.

J. D. GARDNER, for the appellants, cited Drake on Attachments, § 199; 2 Wait's Actions & Defenses, 241; *Saunders v. Garrett*, 33 Ala. 454.

BRICKELL, C. J.—We think it very clear, whatever may have been the reasons inducing it, that the judgment rendered by the Circuit Court is free from error. The undisputed facts are, that the promissory notes made by the garnishees, the amount of which it was sought to condemn to the satisfaction of the plaintiffs' judgment, were given for money loaned. At the time of the loan, the defendant in the judgment stated, that the money was the property of his wife; and one of the notes was made payable directly to her, and the other to the husband as her agent. On this state of facts, *prima facie*, the notes were the property of the wife, upon which in her own name she could have maintained an action at law. The presumption of ownership in the wife it was proposed to repel, by evidence that at least a part of the moneys loaned, if not the whole, was her earnings, which were not her separate property, and which were liable to the payment of the debts of her husband. The insuperable difficulty is, that the wife is not a party to the record, and can not be made a party; and in her absence, a judgment can not be rendered, which will affect and conclude her rights. And if the judgment would not be conclusive upon her, the garnishee would be placed in the peril of a double recovery, if subsequently she should sue upon the notes.—*Simpson v. Tippin*, 5 Stew. & Port. 208.

[South & North Ala. R. R. Co. v. Wood.]

The statute (Code of 1875, § 3302) which authorizes the calling in of a person claiming a debt it is sought to reach by garnishment, to contest with the creditor the right to such debt, is not applicable to a case of this character, in which a creditor of the husband seeks to subject debts *prima facie* the separate statutory estate of the wife.—*Saunders v. Garrett*, 33 Ala. 454. If it was, there has been no notice issued to the wife, and no issue formed between her and the garnishing creditor, the determination of which could bind her; and according to the case last cited, if such notice had issued, it would have been a nullity, which she could properly disregard. The remedy by garnishment has not been by the statute extended to a case of this character, as it has not been to other cases, in which it is the peculiar province of a court of equity to interpose.

Whether the rulings of the Circuit Court can be maintained, as abstract propositions of law, is unimportant. The judgment rendered reached the proper result, and it must be affirmed.

South and North Ala. Railroad Co. v. Wood.

Action against Railroad Company, as Common Carrier, for failing to deliver Freight.

1. *Judicial knowledge; capacity of railroad car.*—The courts can not take judicial knowledge of the rule for the measurement of corn in the shuck, nor declare that a railroad car twenty-six feet long, eight feet wide, and four feet high, can not hold three hundred bushels of corn in the shuck.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

This action was brought by Edmund A. Wood, against the appellant, a domestic corporation; and was commenced before a justice of the peace, on the 12th July, 1876. The complaint, filed in the Circuit Court on appeal, claimed seventy-five dollars as damages for the failure to deliver certain goods, the property of the plaintiff, viz., "seventy-four bushels of corn, received by said defendant as a common carrier, to be delivered to L. K. Moss, at Jemison Station, Alabama, for a reward; which the defendant failed to do." The case has been several times tried, each trial resulting in a verdict and judgment for the plaintiff; but, on appeal to this court, each of these judg-

[South & North Ala. R. R. Co. v. Wood.]

ments was reversed, and the cause was remanded.—See the reports of the case, in 66 Ala. 167, and 71 Ala. 215.

On the last trial, as the bill of exceptions now shows, the plaintiff proved that he purchased from one Copeland, near Blountsville in said county, 300 bushels of corn in the shuck, and employed said Copeland and others to haul the corn to the defendant's depot at Bangor, and there deliver it to the defendant, to be transported on the defendant's cars to Jemison Station, consigned to L. K. Moss, who lived near that station on the defendant's road; and the plaintiff's witnesses testified to their delivery of the corn at Bangor to one Musgrove, the defendant's agent, in one of the defendant's cars, and to their measurement of the corn as delivered. These witnesses testified, "that the corn was of good quality, and reasonably well shuck-shucked;" that the full quantity, 300 bushels, was delivered; that they measured it by a tub, or barrel, "which was shucked and shelled out, and found to contain one bushel, one peck and a half," but was counted as containing one bushel and one peck; that the car, when all the corn was delivered, was about two-thirds full, and was then locked by said Musgrove, the defendant's agent. Other witnesses for the plaintiff testified, that when the car was opened at Smith's Mill (where said Moss lived), about eight days afterwards, and the corn was delivered to said Moss, "the car was not over half-full, and the corn measured out but a fraction over 224 bushels." Said Musgrove testified, as a witness for defendant, that an ordinary car-load of corn, shipped in the shuck, would contain from 285 to 300 bushels, and that he so informed plaintiff while negotiating for the shipment of the corn; and the conductor of the train by which the corn was shipped, testifying as a witness for the defendant, stated that the car was "twenty-six (26) feet long in the clear, eight (8) feet wide in the clear, and about six (6) feet six (6) inches high in the middle, but not so high at the sides." The case seems to have turned on the question, how much corn was delivered by the plaintiff on the car at Bangor, for shipment to Moss at Jemison; the defendant contending that the full quantity received was delivered to said Moss. The defendant requested the court to give several charges to the jury, seven in number, each asserting in substance, but in varying phraseology, that a car of the dimensions stated could not contain 300 bushels, and that if the car was only two-thirds full, when all of the plaintiff's corn had been placed in it, no more than 225 bushels could have been received by the defendant. The refusal of these several charges is now assigned as error.

[South & North Ala. R. R. Co. v. Wood.]

Courts can not shut their eyes to what is known by every person of ordinary intelligence within their jurisdiction. They are bound to take judicial notice of the standards of weights and measures, as established by law, and that contracts for any thing to be sold and delivered in this State must be construed by those standards.—Code, §§ 1460–61. They take judicial notice of the customs of merchants, and the usages of trade; of the general course of the transactions of human life, and whatever ought to be known within their jurisdiction; of the meaning of terms and phrases in ordinary use; of the mechanical and chemical processes employed in the art of photography, the scientific principles on which they are based, and their results; of the fair and reasonable value of cattle; of the manner in which warehouses for the construction of cotton are constructed; of things which belong to the general domain of knowledge and science; of things which must happen according to the laws of nature, and of any thing that is matter of common knowledge and use among the people throughout the country.—*Solomon v. The State*, 28 Ala. 83; *Ward v. The State*, 22 Ala. 16; *Sterne v. The State*, 20 Ala. 43; *Luke v. Culhoun County*, 52 Ala. 115; *S. & N. Ala. Railroad Co. v. Henlein*, 52 Ala. 607; *Hagan v. The State*, 52 Ala. 375; *Brown v. Piper*, 91 U. S. 42; *Gres. Eq. Ev.* 294; *Taylor's Ev.* § 4, note 2; *Hoare v. Silverlocke*, 12 Ad. & El. N. S. 624; *Ross v. Boswell*, 60 Indiana, 240; *Bailey v. Kal. Pub. Co.*, 40 Mich. 256; *Tomlinson v. Greenfield*, 31 Ark. 557. Mathematical truths are matters of absolute certainty; and whenever, on the undisputed facts of a case, the bulk or quantity of an article can be demonstrated to a mathematical certainty, the problem becomes a question of law, and the court should instruct the jury as to the result. Many arithmetics contain rules for ascertaining the number of bushels of corn in a crib, or other building; and common experience, among persons engaged in buying and selling corn, has demonstrated that three bushels of corn in the shuck make one bushel of shelled corn. These are matters of common experience, and of at least proximate certainty; and it was the duty of the court to instruct the jury as to them, instead of remitting the decision of the case to the unknown quantities which enter into the verdict of a jury.

STONE, J.—Much that enters into and shapes human transactions is so general and uniform in its operation, as to be reducible to a rule. The flow of water, the alternation of the seasons, seed-time and harvest, the operation of mechanical powers, are of this class. So, whether certain language is or not, in its very nature, obscene or insulting; whether a weapon

[Comer v. Sheehan.]

of a particular kind is, or is not deadly ; what effect a serious wound in a vital part will have ; what are fermented, and what distilled spirits ; these, and many other factors in judicial determination, are so generally known as to dispense with all proof of them, as a general rule. All men know them, and therefore they need not be proved. This is sometimes called judicial knowledge ; frequently, common knowledge.

We do not think, however, that the rule for the measurement of corn in the shuck falls within this class. True, we know that a cubic yard, which consists of twenty-seven cubic feet, can not contain one hundred bushels of corn in the shuck. Can we know precisely what it will hold ? Is there any generally known, inflexible rule on the subject ? So much must depend on the variety and quality of the corn, and the quantity of shuck left upon it, that no fixed rule can be declared. Suppose we were to declare that a box car $28 \times 8 \times 4$ feet can not hold 300 bushels of corn in the shuck. Can we, with any proximate certainty, say how much it will contain ? A result, so variable as this, can not become a rule, and hence can not become a subject of judicial cognizance. As we said, when this case was before us at a former term (71 Ala. 215), "we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them."—Whar. Ev. §§ 329 *et seq.*

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Comer v. Sheehan.

Action for Rent, by Mortgagee, against Mortgagor's Tenant.

1. *Extinguishment of rent, by tripartite agreement between landlord, his creditor, and tenant.*—A tripartite agreement between the landlord, his creditor, and the tenant or lessee, by which the latter assumes the landlord's pre-existing debt to the amount of the stipulated rent for the year, executing to the creditor his negotiable promissory notes secured by mortgage, which the creditor accepts in satisfaction, *pro tanto*, of the landlord's indebtedness to him, entering a credit as for a partial payment, operates on the principle of novation and substitution, and effects an extinguishment of the original debts between the parties.

2. *Rents and profits, as between mortgagee and mortgagor.*—As against all the world, except the mortgagee and those claiming under him, the mortgagor is regarded as the owner of the mortgaged property, and has the right to convey or lease them, subject to the mortgage ; and he is entitled to the rents and profits, even after the law-day and default made, until they are intercepted by some active assertion of claim on the part

[Comer v. Sheehan.]

of the mortgagee, either by notice to the tenant in possession, or by bill in equity to foreclose.

3. *Lease of premises by mortgagor.*—Under a mortgage of lands which are subject to an outstanding lease, the mortgagee is regarded as the assignee of the reversion, and is entitled to the rents past-due and unpaid, as well as those afterwards accruing, though the tenant is justified in paying them to the mortgagor, until they are intercepted by notice, or proper legal proceedings; but, when the lease is made by the mortgagor after the execution of the mortgage, it is not binding on the mortgagee, who may annul it at pleasure, and eject the lessee as a trespasser; and he can not treat the lessee as his tenant, by merely giving him notice to pay rent.

4. *Purchase by mortgagee at sale under power; notice to tenant in possession.*—When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, the sale is valid as between the parties, notwithstanding the statute of frauds, unless set aside within two years; and if the land is in the possession of a tenant, under a lease executed by the mortgagor subsequent to the mortgage, statutory notice to him by the mortgagee, as such purchaser, “vests in him the right to the possession in the same manner as if such tenant had attorned to him” (Code, § 2878); but, while he may, possibly, thereby acquire a right to maintain an action for future use and occupation, he can not recover rents past-due and unpaid, which the mortgagor had already transferred to another.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Hugh M. Comer, as surviving partner of Bates & Comer, against Daniel T. Sheehan; and was commenced on the 3d December, 1883. By his complaint, the plaintiff claimed of the defendant “four hundred dollars due by him on the 1st December, 1883, for the rent of a warehouse in the city of Eufaula, Alabama, for the months of October and November, and a portion of the month of September, 1883; which said sum, with interest thereon from the 1st December, 1883, is due and unpaid.” The defendant pleaded, “in short by consent, 1st, the general issue; 2d, payment of all the rent; 3d, leave to prove any special matter of defense not requiring a sworn plea;” and issue was joined on these pleas. On the trial, as the bill of exceptions shows, the facts were agreed on, and reduced to writing; and on these facts, the court charged the jury, on the request of the defendant, that they must find for him, if they believed the evidence. The plaintiff excepted to this charge, and he here assigns it as error.

McKLERoy & COMER, for appellant.—A mortgagor in possession, after the law-day and default made, or condition broken, is only the tenant at will, or by sufferance, of the mortgagee; and while he may receive the rents, so long as he is allowed to remain in possession by himself or tenants, this right ceases when the mortgagee enters, or when the purchaser at the mortgage sale gives notice.—*Duval's Heirs v. McLoskey*, 1 Ala. 708;

[Comer v. Sheehan.]

Mansony & Hurltel v. U. S. Bank, 4 Ala. 746; *Coker v. Pear-sall*, 6 Ala. 542; *Smith v. Taylor*, 9 Ala. 633; *Hutchinson v. Dearing*, 20 Ala. 798; *Knox v. Easton*, 38 Ala. 356; *Micou v. Ashurst*, 55 Ala. 607; *Woodward v. Parsons*, 59 Ala. 628; *Otis v. McMillan & Son*, 70 Ala. 53; *Johnston & Stewart v. Riddle*, 70 Ala. 225; *Branch Bank v. Fry*, 23 Ala. 770; *Marx v. Marx*, 51 Ala. 222; Jones on Mortgages, vol. 1, §§ 773-80. If a mortgagor, while so in possession after default made and condition broken, can make a valid lease for one year, collect the entire rent in advance, or transfer it for value to a third person, to the injury or destruction of the mortgagee's rights, he may do so for five, ten, or any other number of years, within the limits of a lawful lease. But the rent sued for was in fact past-due and unpaid, and the bank was not entitled to protection as an assignee for valuable consideration without notice; being chargeable with constructive notice of the mortgage, and having only given the mortgagor credit on an existing indebtedness.—*Loeb & Bro. v. Flash Brothers*, 65 Ala. 542. In addition to his rights as mortgagee, the plaintiff became the purchaser at the sale made under the power in the mortgage; and having given the statutory notice to the tenant in possession, the right of possession thereby vested in him, by the express words of the statute, "in the same manner as if such tenant had attorned to him."—Code, § 2878. These words are without meaning or effect, unless they dispense with the necessity of an attornment by the tenant, and create the relation of landlord and tenant between the purchaser and the person so in possession; and where this relation exists, an action for rent due and unpaid may be maintained.

WATTS & SON, and S. H. DENT, *contra*.—On the admitted facts, the plaintiff might have maintained ejectment against the defendant, and might have ejected him as a trespasser; but there was no privity between them, and he could not maintain an action for rent.—1 Jones on Mortgages, § 777; Taylor's Landlord & Tenant, §§ 120-21; *Shumake v. Nelms*, 25 Ala. 126; *Smith v. Houston*, 16 Ala. 111; *McCuan v. Tanner*, 54 Ala. 84; *Bisquay v. Jennelot*, 10 Ala. 245; *Langford v. Green*, 52 Ala. 103; *Kennon v. Wright & Frazier*, 70 Ala. 434. If the plaintiff had been the assignee of the reversion, he could not have recovered under his complaint.—*Wise v. Falkner*, 51 Ala. 362. His purchase at the sale under the mortgage gave him no additional rights, since, as mortgagee, he was entitled to the possession after the law-day and default, and might have recovered it by action; nor is there any proof that he has ever received any conveyance as purchaser, or made any demand for the rents. But there could be no recovery of rent *eo nom*—

[Comer v. Sheehan.]

ine, since that was extinguished by the original contract between Hart, Sheehan, and the bank.—*Knighton v. Curry*, 62 Ala. 404; *Underwood v. Lovelace*, 61 Ala. 155.

SOMERVILLE, J.—The suit is one brought by the plaintiff against the defendant, claiming the sum of four hundred dollars, alleged to be due “for the *rent* of a warehouse in the city of Eufaula,” for the last quarter of the year 1883. No relation of landlord and tenant is averred to exist between the parties, nor is there any statement in the complaint of any promise, express or implied, by the defendant, to pay the amount claimed to the plaintiff, nor of facts from which such a promise may be inferred.

It is disclosed by evidence, that the plaintiff's claim was based upon the fact of being *mortgagee* in a mortgage conveyance of the warehouse premises, and also of being a *purchaser* at his own sale, made under a power contained in the mortgage. The premises were owned by one Hart, who mortgaged them to the plaintiff, in February, 1881, with power of sale on default. After the execution of this mortgage, Hart leased the premises to the defendant, Sheehan, for about the sum of two thousand dollars; the rental year commencing August the first, 1883, and ending August the first, 1884. The entire amount due for rent was settled by the following arrangement made between the plaintiff, the defendant, and the Eufaula National Bank: Hart owed the bank, and the latter agreed to take Sheehan's notes for an amount equal to the rent, and discharge Hart, *pro tanto*, on his indebtedness. These notes were given in the form of commercial paper, payable to Hart, or bearer, and were delivered immediately to the bank, being secured by a mortgage executed to the latter by Sheehan. Hart received a corresponding credit on his indebtedness. One of these notes, for four hundred dollars, fell due on December 1st, 1883,—the only one necessary to be particularly considered, as the claim made in this action is predicated upon it.

The mortgaged property was advertised by Comer, the mortgagee, and sold under the power of sale conferred by it; the proceedings being in all respects regular, and he becoming the purchaser at his own sale, on November 15, 1883. On the twenty-seventh of the same month, and prior to the first of December, 1883, the plaintiff, as purchaser, gave notice to the defendant, as tenant in possession, of the fact of his purchase, and that the property had not been redeemed,—all in full accordance with the requirements of the statute.—Code, 1876, § 2878.

The court below charged the jury, under this state of facts, that the plaintiff was not entitled to a recovery of the rent sued.

[Comer v. Sheehan.]

for, and that they must find for the defendant, if they believed the evidence.

It is a material consideration, of primary importance, that the arrangement made between Sheehan, Hart and the bank, which was tripartite in its nature, created a new contract, which operated as a payment of the rent-debt, on a principle analogous to that of novation and substitution. The principle is, that where several persons are mutually indebted to each other, they may, by agreement amongst themselves, vary their respective liabilities, and substitute one debt in the place of another. "By a mutual contract and arrangement," says Mr. Addison, "between all the parties interested—creditor, debtor, and payee—the original debts are extinguished, and the annihilation of those debts is a sufficient consideration for the promise to pay the new debt."—1 Add. Contr. (Amer. Ed.) § 373, p. 528. The term *novation* has been defined to be, "a transaction whereby a debtor is discharged from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by order of his original creditor."—1 Parsons Contr. 217*; Pothier's Oblig. 546-549.

The legal effect of the present transaction, in our judgment, was, by mutual agreement of all the contracting parties, an assumption by Sheehan of a portion of Hart's debt to the bank, equal in amount to his own debt due to Hart, which was for the rent. It was distinctly agreed, that Hart's debt should be discharged, *pro tanto*; and the law operated to discharge Sheehan's debt, by the intervention of a new creditor, who was substituted, by consent, for the old one, thus liberating him from all obligation to pay Hart any thing. The essential nature of the transaction can not be varied by the fact, that the notes of Sheehan were made payable to "Hart, or bearer," as they were delivered immediately to the bank, and do not appear to have even passed through the hands of the nominal payee, the use of whose name was conventional merely, or else for the purpose of super-adding his conditional liability as indorser. The transaction was not a mere transfer of the rent-notes of Sheehan to the bank, but rather the assumption by Sheehan of a portion of Hart's debt to the bank, equal in amount to the rent debt, and based upon it as a legal consideration.

The case must, therefore, be regarded as one of a lease made by a mortgagor, subject to the rights of the mortgagee, where the tenant has undertaken to pay the entire rent for the year in advance.

The plaintiff bases his right of recovery, as we have said, both upon the fact of being *mortgagee*, and *purchaser*, at his own sale, of the equity of redemption. The defense of the tenant is based on the theory, that the plaintiff is not entitled

[Comer v. Sheehan.]

to the rents as mortgagee, because he has never demanded them; nor as purchaser, because there is no privity of contract between them as landlord and tenant, and, if liable at all, that he is liable only for mesne profits, or use and occupation from the time of notice given, which was on the twenty-seventh day of November, 1883.

The rights of the mortgagor in the mortgaged premises are well settled. He is regarded as owner of the property, as against all persons except the mortgagee and those claiming under him.—*Allen v. Kellam*, 69 Ala. 442. He has the power of conveying or leasing the premises, subject to the incumbrance, and is entitled to the rents and profits, until they are intercepted by some active assertion of claim to them by the mortgagee, made after law-day of the mortgage, either by giving notice to the tenants in possession, or by filing his bill in a court of equity for the purpose of foreclosure.—*Johnston v. Riddle*, 70 Ala. 219; *Scott v. Ware*, 64 Ala. 174; 1 Jones Mortg. § 670; Taylor's Land. & Ten., §§ 118–119.

There is no evidence of any demand being made by the plaintiff for the rents, and it can not be contended that there can be any recovery from the tenant by the plaintiff, in the capacity of mortgagee, without such demand.

It is contended, however, with more plausibility, that the plaintiff can recover as *purchaser*.

There is a manifest distinction between the rights of a mortgagee, as against a tenant, where the mortgage is *prior* in point of time to the lease, and where it is *subsequent* to it. We speak now of the rule at common law, apart from any influence of statutory changes. Where a lease is first made for a term of years, reserving rent, there is nothing besides reserved to the lessor, apart from the benefit of certain covenants, but the reversion. A mortgage, or other conveyance, afterwards made by the lessor, is, therefore, a mortgage of the reversion, and carries with it the rent, which is not yet due, as a mere incident. In other words, the mortgagee, as assignee of the reversion, has no higher rights than the mortgagor. By reason of his privity of estate, he is entitled to the rents, past-due and unpaid, as well as those accruing in the future; but until he intercepts them by notice, or legal proceedings, the tenant is justified in paying them to the mortgagor. The effect of demand by notice is to create, of itself, the relation of landlord and tenant between the mortgagee and tenant in possession under the lease.—Taylor's Land. & Ten. § 119; 1 Jones on Mortg. §§ 773–776.

But the rule is different, *where the lease is executed after the mortgage*. It is not, in such case, binding on the mortgagee, and may be annulled or extinguished at his pleasure. The

[Comer v. Sheehan.]

tenant, moreover, who holds under such a lease, may be treated by the mortgagee as a mere trespasser, and ejected without notice.—*Jackson v. Fuller*, 4 John. 215. The mortgagee can not, as in the former case, make the tenant in possession his own tenant, merely by giving him notice to pay rent. To create this relationship, there is required to be an *attornment* of the tenant, or some act on his part which will operate as its legal equivalent.—*Taylor's Land. & Ten.* § 129 ; 1 *Jones Mortg.* § 777.

A question of moment pressed on our consideration is, as to how far this principle has been modified by our statutes.

Section 2878 of the present Code is invoked, as being conclusive of one phase of the question before us. It is declared in the section preceding (2877), that where real estate, or any interest therein, is sold under any power of sale in a mortgage, or in other way therein specified, the debtor has two years within which to redeem. Section 2878 proceeds to provide as follows: "The possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, if in his possession, on demand of the purchaser, or his vendee. If the land is in possession of a tenant, *notice to him* by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, *vests the right to the possession in him, in the same manner as if such tenant had attorned to him.*"

We are of opinion, that one who purchases, as mortgagee, at his own sale, comes within the benefit designed to be secured by this statute, although no deed, or other written memorandum of the sale, is made at the time, so as to rescue the transaction from the influence of the statute of frauds. The case of *Cooper v. Hornsby*, 71 Ala. 62, decides that such a sale is valid, as against third parties, on collateral assailment, not being strictly void, but voidable merely by interposition of the statute, which is considered as waived, unless specially pleaded by one having the right to set up the defense. The sale, therefore, is binding so long as the parties do not object to its validity, and it would operate to cut off the equity of redemption of the mortgagor, and reduce it to a mere statutory right of redemption after the lapse of two years.—*Cooper v. Hornsby*, *supra*, 71 Ala. 65 ; see, also, *Harris v. Miller*, 71 Ala. 26.

The notice, therefore, which was served by the plaintiff upon the defendant, as tenant, on the twenty-seventh day of November, 1883, operated, under this statute, merely to vest in the plaintiff *the right to the possession* of the mortgaged premises, "in the same manner as if such tenant had *attorned* to him." Code, § 2878. This is in full harmony with another provision of the Code, which makes every conveyance of real estate,

[Comer v. Sheehan.]

which is occupied by a tenant, "good and effectual without attornment."—Code, § 2177. The settled rule of the common law anciently was, that no tenant could be compelled to recognize any purchaser of the reversion as a landlord. He could refuse to attorn to him, and thus defeat the conveyance. And such refusal, of course, at the same time defeated the purchaser's right of possession.—Co. Litt. 309 *a, n.* (1); *English v. Key*, 39 Ala. 116. The clear purpose of the statute is to correct the mischief of this principle. It dispenses with any necessity of attornment, and abrogates the right of the tenant to withhold his fealty, as tenant, from the purchaser as landlord, unless he chooses to abandon his lease and quit the premises.

To what extent does this entitle the purchaser to rents, either as such, or by way of use and occupation, in the event of the tenant's continuing to hold possession? It is obvious that his rights in this particular can not, at best, be superior to the combined rights of the mortgagor and of the mortgagee, whose respective titles have coalesced in him in his new relationship. The whole can not be greater than the sum of its parts. The mortgagor had no right to any rent, because he had collected it all. There being no rents due, and none to fall due, the mortgagee could only claim for future rents, based upon use and occupation. The policy of our statutes is to protect tenants against coerced exactions of double rent. Where a sale of lands is made while in the possession of a tenant, the latter is protected from liability to the purchaser for rents, so long as he is without notice of the conveyance.—Code, § 2177. So, a tenant who is in possession, asserting rights under a lease from another, is declared not to be liable, in actions for realty, "beyond the rent in arrear at the time of suit brought, and that which may accrue during the continuance of his possession."—Code, § 2965.

If the plaintiff had any remedy, it was not in the form of action here adopted; but by action, probably, for use and occupation, or for *mesne* profits,—a point, however, which we do not now undertake to decide.—Code, 1876, § 2956; Taylor's Land & Ten. §§ 639 *et seq.*; §§ 710-712.

Judgment affirmed.

Wright v. Grabfelder & Co.

Petition for Supersedeas of Execution.

1. *Claim of exemption; when and how made.*—A claim of property as exempt from levy and sale under execution, or other legal process, may be asserted in either one of two ways: 1st, *before* the levy or seizure under legal process, by a declaration in writing, describing the property so claimed, verified by oath, and *filed for record in the office of the probate judge* (Code, § 2828); 2d, *after* the levy or seizure under legal process, by a similar claim in writing, and under oath, “*which must be lodged with the officer making the levy*” (*Ib.* § 2834); and if not asserted in one or the other of these two modes, the claim is waived.

2. *Same; after execution of forthcoming bond.*—When no declaration and claim has been filed prior to a levy, and the defendant is in possession of the property under a forthcoming bond, “it may admit of question whether a valid claim of exemption can be interposed” while the property so remains in his possession. Possibly, the proper practice would be to first surrender the property, in discharge of the bond, and then make the affidavit of claim; but this is not decided.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This was a petition for the *supersedeas* of an execution, filed by James K. Wright, the principal defendant therein, and alleging these facts: On the 2d June, 1882, judgment was rendered against said petitioner, in favor of S. Grabfelder & Co., for \$114.83, besides \$9.30 costs; and upon this judgment an execution was issued, and placed in the hands of the sheriff of Jackson county. “Said execution was levied by said sheriff, by his deputy, on January 20th, 1883, on one black horse and one two-horse wagon; and petitioner executed bond and security for the delivery of the property on the day of sale, on the 5th day of March, 1883. On the 30th January, 1883, petitioner filed his schedule of exemptions, claiming said property as exempt, and, on the same day, notified the said deputy-sheriff that he had filed his schedule claiming said property as exempt; but said deputy-sheriff did not take possession of said schedule, but left the same with your petitioner. On the same day, said deputy had one other execution against your petitioner, which had been levied on one mule; and on presentation of said claim, said deputy released the mule, and discharged the levy. Not receiving any notice of contest, petitioner supposed the levy of the other execution (in favor of said Grabfelder & Co.) had also been discharged; and his child being very sick, he did not at-

[Wright v. Grabfelder & Co.]

tend on the 5th March, 1883, the day of sale, believing that said levy had been discharged; but, to his surprise, said execution was returned, indorsed '*Bond forfeited*,' and a new execution placed in the hands of said deputy-sheriff, who is about to levy the same upon the property of the sureties on the delivery bond, notwithstanding said schedule of exemptions was placed on file with the sheriff, before or about the time of the issuance of the new execution, and is now on file with the papers in the hands of said deputy who has said execution. Petitioner further shows, that said property was not liable to sale, and although levied upon, when the claim of exemption was interposed, then the bond was satisfied, unless trial of liability was had and property found subject."

A copy of the schedule and claim of exemption was made an exhibit to the petition, which shows that it was subscribed and sworn to, on the 30th January, 1883, before the judge of probate, and filed with him for record on that day. A demurrer to the petition was filed by Grabfelder & Co., assigning the following (with other) special grounds of demurrer: "7. It does not appear from said petition that the condition of said forthcoming bond was performed and satisfied, by a delivery of the property levied on to the proper officer, according to the terms of said bond, nor is any sufficient reason shown why said property was not so delivered." "8. It does not appear from said petition that the property levied on under said execution, and delivered to the defendant on the delivery of said forthcoming bond, was destroyed or died before the day for the delivery thereof, without fault on his part, and that the obligors in said bond have tendered the value thereof to the plaintiffs, their agent or attorney, and that such tender has been refused." Another ground of demurrer, specially assigned in different forms, was the failure of the petition to show that the claim of exemption was "lodged with the officer making the levy," as provided by the statute. The court sustained the 7th and 8th assignments of demurrer, but overruled the others; and the petitioner declining to amend, his petition was dismissed. The judgment sustaining the demurrer is now assigned as error.

L. C. COULSON, for appellant.

W. L. MARTIN, *contra*.

STONE, J.—Our constitution and statutes have exempted the homestead and certain personal property (up to a certain value), of the residents of this State, from liability to execution, or other process for the collection of debts. These exemptions, however, do not operate *ex proprio vigore*. To be

[Wright v. Grabfelder & Co.]

available, they must be asserted in proper time. In *Sherry v. Brown*, 66 Ala. 51, speaking on this question, we said: "Homestead exemptions, as well as exemptions of personal property, have always been construed by our courts as mere personal privileges, which may be, and are held to be waived, unless claimed at the time, and in the manner prescribed by law." And in *Block v. Bragg*, 68 Ala. 291, we defined, to some extent, what was necessary for the assertion of a valid claim of exemption.

Prior to the act of 1877, revising our exemption laws, we had very meagre provisions for asserting the right of exemption, and scarcely any statutory directions for controverting such right. That statute undertook to supply the necessary machinery. Section 2828 of the Code of 1876 provides for a claim of exemption, and a record to be made of it, before any levy or seizure is made. When this is done, no creditor can have the property seized, or levied upon, without first making affidavit, and giving bond, as prescribed in section 2830 of the Code. But the claimant of exemption was not required to resort to this method of asserting his claim. He could wait until after the levy was made, without thereby waiving his right to make the claim. Section 2834 of the Code declares how the claim shall be asserted, in such case. It may then be asserted "in writing, under oath, as provided in section 2828, which shall be lodged with the officer making the levy." This constitutes a valid assertion of claim in such conditions, and not only authorizes, but requires the officer making the levy, to desist from further execution, until certain proceedings therein prescribed are had. And this section clearly shows why it is that the affidavit of claim shall be lodged with the officer making the levy. It is his authority—his only authority—for suspending further execution. It is more: it is the initiatory step in the contest of the claim, should the plaintiff in execution elect to contest. It is the mode the law prescribes, for notifying the levying officer that the claim is made; and when the written affidavit of claim is lodged with him, the claimant has nothing further to do, at that stage of the proceeding. This suspends the execution, and it then becomes the duty of the officer, within three days after the lodgment of such claim with him, to give to the plaintiff, his agent, or attorney, written notice of such claim, who may, within ten days thereafter, contest such claim. Failing to contest within the ten days, it is the duty of the officer to discharge the levy, and restore the property to the defendant. Now, it is manifest that, under this statute, the plaintiff in execution is entitled to notice—ten days notice—that property he has had levied on is claimed as exempt, before the levy can be discharged. The

[Wright v. Grabfelder & Co.]

levying officer must give this notice, and failing to do so in a proper case, he would be guilty of official misconduct, fixing a liability on himself; and hence, it is equally manifest, that the affidavit of claim should be lodged with him, before he could be required, or would even be authorized, to suspend execution, or to serve notice of claim on the plaintiff, his agent, or attorney. It follows from this, that there can be no valid claim of exemption, under section 2834 of the Code, until the affidavit asserting it is lodged with the officer making the levy.

According to the averments of the petition for *supersedeas*, the claim was not interposed, nor the affidavit made, until after the sheriff had levied, and the defendant had executed a forthcoming bond. It was then too late to make claim under section 2828 of the Code, and make that claim effective against the execution in this case. The claim, after levy, could only be made, by conforming to section 2834 of the Code. This requires that the affidavit of claim shall be lodged with the officer making the levy. The petition not only fails to show this was done, but the necessary implication is that it was not done; at least, until after the forthcoming bond was returned forfeited, and an execution issued thereon. Notifying the sheriff that he, defendant, had filed his schedule of exemptions, was not enough. This did not authorize suspension of the execution, nor require the sheriff to notify the plaintiff in execution that a claim of exemptions had been interposed. In fact, no such claim had been interposed, in the form and manner the law requires.

It may admit of question, whether a valid claim of exemption can be interposed, while the property remains with the defendant under a forthcoming bond. Difficulties might arise in the matter of executing bond under section 2836 of the Code. Possibly, the proper practice in such case would be, to first surrender the property in discharge of the forthcoming bond, and then make the affidavit of claim. But we need not decide this.

The judgment of the Circuit Court, sustaining the demurrer to the petition for *supersedeas*, is affirmed.

[Connor v. Jackson.]

Connor v. Jackson.*Action on Attachment Bond.*

1. *Advances to make crop; sufficiency of recitals in note.*—A writing which expresses as its consideration “necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me *bona fide* for the purpose of making a crop the present year;” and further declares, “without such advances it would not be in my power to procure the necessary teams, provisions, money, implements, &c., to make a crop the present year,”—shows a substantial compliance with the requisitions of the statute (Code, § 3286), and creates a statutory lien on the maker’s crop.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Ace Jackson, against Martin Connor and his sureties on an attachment bond, to recover damages for an alleged breach of the bond; and was commenced on the 30th December, 1882. The attachment was sued out on the ground, as expressed in the affidavit on which it was founded, that said Jackson “is justly indebted to said Connor in the sum of \$157.85, for necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to purchase the same, obtained *bona fide* for the purpose of making a crop the present year (1882), and that the said Jackson has removed from the premises, or otherwise disposed of a part of the crop, without paying the amount of said advances, and without the consent of the said Martin Connor, so that ordinary process of law can not be served on him.” Issue being joined, as the bill of exceptions recites, “on the plea of *not guilty*,” the plaintiff read in evidence the affidavit, bond and attachment, and proved that he was the tenant of one Warrick for the year 1882, and had executed to said Connor an instrument of writing, commonly called a crop-lien note, in words and figures as follows:—

“By the first day of October next, I promise to pay M. Connor, or bearer, two hundred and fifty dollars for value received, it being for necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me *bona fide* for the purpose of making a crop the present year on Warrick’s plantation, and all plantations cultivated by me, or under our direction, in Pike county, Alabama; and without such advances it would not be

[Connor v. Jackson.]

in our power to procure the necessary teams, provisions, money, implements, &c., to make a crop the present year; hereby creating a lien thereon, in accordance with sections 1858 to 1860 inclusive of the Revised Code of Alabama, and sections 3286 to 3288 inclusive of the present Code; and it is further agreed, that if the said Connor shall advance me any thing, over and above the amount named in the above note, this lien shall stand as security for the same, as fully as if included in the original amount of this instrument; and to further secure the payment for the said advances," a waiver of exemptions was then added. This instrument was dated January 12th, 1882, and duly recorded on the 3d February, 1882.

The plaintiff having further proved the value of the property taken under the attachment, and the attorney's fees paid by him in defending the attachment suit, "the defendants then introduced testimony showing the amount due as claimed in the attachment, and that the same was then due and unpaid for advances made under the said instrument above set out; and they also introduced evidence tending to show that said plaintiff had removed a portion of the crop from the premises, without his consent, and without paying for said advances; the real point of contention being, that said note created a statutory lien enforceable by attachment, and therefore an attachment would be properly sued out, so far as such lien is concerned, under said note. This being substantially all the evidence, the court charged the jury, that said instrument did not give or create any lien on plaintiff's crop for said year, and that said attachment was therefore wrongfully sued out, so far as it was founded on any lien supposed to be created by said note." The defendants excepted to this charge, and they here assign it as error.

PARKS & SON, for appellants.

STONE, J.—The contract in the present case was intended to conform to section 3286 of the Code of 1876, and to create what is called a crop-lien. The court below held the writing insufficient; and that is the only question presented by the record. The writing binds Jackson to pay two hundred and fifty dollars, and expresses, as the consideration, "necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me [Jackson] *bona fide* for the purpose of making a crop the present year." The writing declares, that "without such advancements, it would not be in my [Jackson's] power to procure the necessary teams, provisions, money, implements," &c., "to make a crop the present year." We think the words

[Home Protection of North Ala. v. Richards & Sons.]

last copied were intended to refer, and do refer to those first stated, and that they were intended to be equally comprehensive. We hold them to be the equivalent of the expression, "the said articles," or, "the commodities aforesaid." Either of these, preceded by a proper enumeration of the articles furnished, if within the classes the statute permits, would constitute a sufficient declaration in writing, or *written note*, to create the lien.

We apprehend the circuit judge was misled by some expressions found in *Schuessler v. Gains*, 68 Ala. 556. The ruling in that case was clearly correct, in the case then presented. When, however, as in this case, the writing shows the necessity for the advance to make a crop, and is as broad as the advance obtained, the spirit and substance of the statute are complied with.—*Fleener v. Dickerson*, 65 Ala. 129; *Collier v. Faulk*, 69 Ala. 58.

Reversed and remanded.

Home Protection of North Ala. v. Richards & Sons.

Action on Policy of Fire Insurance.

1. *Constitutional provisions as to actions against corporations; where corporation may be sued.*—The constitutional provision which declares that corporations "shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons" (Art. xiv, § 12), forbids the imposition of arbitrary, unjust and odious discriminations against them, under the form or guise of laws regulating judicial procedure; but it has no reference to the venue in civil actions, which belongs only to the remedy or form of procedure; and it does not inhibit the passage of a general law authorizing a corporation to be sued in any county in which it transacts business through its agents, though an individual citizen can only be sued in the county of his residence. On the contrary, such a law is based on sound reasons, growing out of the difference between natural and artificial persons, does not violate the essential principles of justice, and does not establish an unjust or unreasonable discrimination against corporations.

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by the appellees, suing as partners, against the appellant, a domestic corporation; was founded on a policy of insurance on a quantity of "ties," which the plaintiffs had effected with the defendant corporation, against loss or damage by fire; and was commenced on the 22d Feb-

[Home Protection of North Ala. v. Richards & Sons.]

ruary, 1883. The defendant filed a plea in abatement, duly verified by affidavit, averring that it was a freeholder and had a permanent residence in Madison county, and was not subject to be sued in any other county. The court sustained a demurrer to this plea, and its judgment is now assigned as error.

OVERALL & BESTOR, for appellant.

J. L. & G. L. SMITH, *contra*.

SOMERVILLE, J.—Section 2928 of the present Code of Alabama provides, that “No *freeholder* nor *householder* of this State, having a *permanent residence* within it, must be sued out of the county of his residence.” The only exception relates to suits for the recovery of real property, or trespasses upon realty. It is declared that “any summons, issuing contrary to the provisions of this section, must be *abated* on the plea of the defendant.”—Code 1876, § 2928.

A different rule is, however, prescribed for the *venue* of suits against *corporations*. The act of the General Assembly, approved February 13th, 1879, provides, that “suits against any corporation, foreign or domestic, may be brought in *any county* in this State in which such corporation *does business by agents*.” Acts 1878–79, p. 197.

The question presented for our consideration in this case is the constitutional validity of this act. The appellant is a domestic corporation, chartered under the laws of Alabama; is a freeholder, with its chief place of business in the county of Madison, and claims to have “a permanent residence” in the latter county, within the meaning of the statute. It does business by agents, however, in the county of Mobile, where the present suit was instituted against it under the provisions of the act of February, 1879. A plea in abatement, setting out these facts, was filed in the court below, to which a demurrer was sustained by the presiding judge. The only error assigned is the sustaining of this demurrer.

The contention is, that the General Assembly is forbidden by the constitution from prescribing different rules of civil procedure for domestic corporations and for natural persons; that these two classes of persons must be placed on terms of perfect equality, as to all civil procedure in the State courts. The clause of the constitution which is invoked as conferring this right is section 12 of Art. xiv of the constitution of 1875, which is as follows: “All corporations shall have the right to sue, and shall be *subject to be sued*, in all courts, *in like cases as natural persons*.”

It is one of the common-law incidents of a corporation, that

[Home Protection of North Ala. v. Richards & Sons.]

it has "the capacity of suing and being sued the same as a natural person;" and this power is usually so specified in corporate charters granted by legislative acts.—Field on Corp. § 360. In *South & North Ala. R. R. Co. v. Morris*, 65 Ala. 193, where we carefully considered this section of the constitution, in connection with several other clauses bearing on the subject of the relative rights of corporations and natural persons, we said, that the clear legal effect of these provisions was to place them, "as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this State, except so far as may be otherwise provided in the constitution." We added, that "this right, though *subject to legislative regulation*, can not be impaired or destroyed under the guise or device of being regulated;" and we construed the free exercise of this constitutional right as thus conferred, to forbid "the imposition of arbitrary, unjust and odious discriminations," against either the one or the other of these classes of persons. We adhere to the views expressed in that case, as a proper exposition of these constitutional provisions.

The chief point of inquiry seems to be, is the act under consideration, which prescribes a rule of *venue* for corporations different from that prescribed for natural persons, a reasonable regulation of a constitutional right, based on an essential difference in the legal nature of persons corporate and persons natural; or, is it a mere arbitrary rule, unjustly discriminating against corporations, in violation of a certain equality before the law intended to be conferred, as far as practicable, by the constitution? It is plain that there are various manifest distinctions between natural persons, or human beings, and corporations, which afford great latitude for the exercise of legislative discretion in fixing the rules of procedure by which they are necessarily to be governed in civil suits and the service of process. A natural person possesses an actual corporeal existence, and can exercise many civil rights which can not be an attribute of corporations. Such a one may have a visible habitation, and, while he may have more than one residence, he can have but one domicile, or fixed place of abode, depending upon both fact and intent, which together determine the question of domicile.—2 Parsons Contr. 579. In general terms, it has been said, that "one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations."—*Lyman v. Fiske*, 17 Pick. (Mass.) 231. There are many forcible reasons, rendering it proper that a natural person should be sued in the county of his permanent residence, which have no application to corporations. The State exacts of him many personal duties, the exercise of which

[Home Protection of North Ala. v. Richards & Sons.]

would be greatly interfered with, if he were frequently required to leave his domicile, to engage in litigation. Among these are the duty of serving on juries, grand and petty, road duty, the privilege of voting at elections, Federal, State and municipal, to say nothing of others of less importance. A body corporate, on the contrary, is incorporeal and intangible in its nature. It is a mere legal entity, or imaginary person. Having no bodily existence, it can have no *actual* residence. Its place of residence is, in the nature of things, only *constructive*, and is determined rather upon principles of legal necessity, analogy and convenience, than upon any other theory. The courts have, therefore, differed in their views as to the place where a corporation should be held to reside.—*Wood v. Hartford Fire Ins. Co.*, 33 Amer. Dec. 399, NOTE. All concur in the recognized difference between foreign and domestic corporations, and that the former are non-residents, and that the latter are to be considered as residents, and, for some purposes, citizens of the State by which they are created, or chartered.—Field on Corp. § 363-366; 1 Parsons Contr. 139.

In the absence of any rule prescribed by the legislature, the prevailing rule would seem to be, that the residence of a corporation, for the purpose of laying the *venue*, would be the county of its principal office or place of transacting business, depending not upon the habitation of the members or stockholders, but on what has been aptly termed "the official exhibition of legal and local existence."—*Ang. & Ames Corp.* § 107; 2 Redf. Railw. (5th Ed.) 420, note 14; *Thom v. Cen. R. R. Co.*, 2 Dutch. 121; Field on Corp. § 517. In the case of railroad companies, it has been said, that this rule must be limited to the range of the company's legally defined route.—*C. & P. R. R. Co. v. Cooper*, 30 Vt. 476. There are a number of well considered cases opposed to this view, however. In *Pond v. The Hudson River R. R. Co.*, 17 (N. Y.) How. Pr. 545, while the general rule is recognized, that the place of residence of a domestic corporation is usually ascertained by its place of business, it is held that, if a corporation have several places of business, it must also be deemed to have several places of residence. In *Glaize v. So. Ca. R. R. Co.*, 1 Strob. L. Rep. 70, it was held, that while a corporation might have a constructive residence, so as to be charged with taxes and duties, its legal residence extended throughout the territorial limits of the State which granted its charter. It was said, that the "residence of the company, if a local residence can be affirmed of it, is most obviously where it is actively present in the operation of its enterprise." So, in *Raymond v. The City of Lowell*, 6 Cush. (Mass.) 524, it was decided that, unless prohibited by statute, a municipal or other corporation could be sued in any county in

[Home Protection of North Ala. v. Richards & Sons.]

the commonwealth. In *Wood v. Hartford Ins. Co.* (13 Conn. 202), 33 Amer. Dec. 395, it was said, "A corporation is a mere ideal existence, subsisting only in contemplation of law; an invisible being, which can have, in fact, no locality, and can occupy no space, and therefore can not have a dwelling-place." In *Hartford Fire Ins. Co. v. Town of Hartford*, 3 Conn. 15, the same court had said: "An inhabitant necessarily implies a habitation. It requires no reflection to determine, that in this sense a corporation resides nowhere." These cases are cited, not for approval, but only to illustrate the forcible reasons which have induced respectable courts to differ upon the question under consideration. So, the rule of the common law was, that the *venue* in transitory actions was never material, except when made so by particular acts of parliament.—1 Tidd's Prac. 427-8.

It is not clear that the framers of the constitution had any reference to the *venue* of civil actions, in framing the clause of that instrument under consideration. It is a general rule, that no one has any vested right to any particular remedy or form of procedure, and that the matter of *venue* belongs to the procedure or remedy, and is no part of the right itself. The act of February 13th, 1879, the constitutionality of which is assailed by the appellant, is intended only to regulate civil procedure, and does not, in our judgment, appear to be such an unreasonable discrimination as that we can pronounce it to be arbitrary, capricious, or without the semblance of reason. Unless this be true, there is usually no other limitation upon the authority of the law-making power, in the exercise of its discretion as to classification of persons, and the shaping of remedies so as to adapt them to the inherent nature of the subject-matter of legislation, in the infinitude of their changing variety.—*State, ex rel. Moog v. Randolph*, at last term. There is no objection that such legislation, by operating upon the remedy, seriously impairs any legal right of the appellant. The basis of the whole objection urged is, that the intention of the constitution is to confer equality as to remedies and remedial rights, and that the present discrimination is an arbitrary violation of this equality. We do not so regard it. There can be nothing arbitrary which is based upon sound reason, and does not violate the essential principles of justice. The act in question declares the residence of corporations to be in any county where they do business by agents, at least for the purpose of suit. As a corporation can manifest its existence in no other way than by the acts of its officers and agents, we are not prepared to say that the General Assembly is forbidden by any thing in the constitution to declare such a rule of civil procedure.

The judgment is affirmed.

[Giddens v. Crenshaw County.]

Giddens v. Crenshaw County.

Bill in Equity for Injunction of Judgment by Confession.

1. *Power of attorney to confess judgment as surety for fine and costs.*—A writing, addressed to the sheriff, in these words: "I propose to go on J. M.'s security for costs and fine, in case he is convicted, jointly with B. R.,"—is not, *it seems*, sufficiently definite and specific as a power of attorney to authorize a judgment by confession against the writer, jointly with B. R., for the fine and costs imposed on J. M.

2. *Estoppel against assailing judgment by confession.*—When a judgment by confession in a criminal case is improperly entered against a surety, on a power of attorney substantially defective, and an execution issued thereon is levied on his property, if he then obtains a postponement of the sale, by promising to pay a part of the judgment within thirty days, and the residue by another day, he thereby estops himself from afterwards assailing the validity of the judgment on account of the defective power of attorney.

APPEAL from the Chancery Court of Crenshaw.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 14th June, 1882, by James T. Giddens, against the county of Crenshaw and the sheriff of said county; and sought an injunction against a judgment which had been rendered by the Circuit Court of said county, on the 17th March, 1882, against said Giddens and one B. R. Ingram, as sureties for one Joseph Mastin, for the fine and costs imposed on him in a criminal prosecution. The judgment was in regular form, and purported to be rendered by confession in open court; but the complainant alleged that he was not present in court, and that the judgment against him was rendered without authority. The answer of Crenshaw county alleged that the judgment was confessed under authority of a "written order, or instructions of complainant to the sheriff of said county," which was made an exhibit to the answer, and which is copied in the opinion of the court. On final hearing, on pleading and proof, the chancellor dismissed the bill, but without giving any reasons for the decree; and his decree is now assigned as error.

R. M. WILLIAMSON, for the appellant.—The judgment is regular on its face, and does not set out the facts which show its invalidity. If those facts had been stated in the judgment, the error could be remedied.—*Hodges v. Ashurst*, 2 Ala. 301; *Bissell v. Carville*, 6 Ala. 503; *Elliott v. Holbrook*, 33 Ala. 659.

[Giddens v. Crenshaw County.]

The paper writing, relied on as a power of attorney, is void for indefiniteness and uncertainty; and it was subject to revocation at any time. The conversation between the complainant and the sheriff, as testified to by the latter, is outside of any issue presented by the pleadings, and not responsive to any interrogatory propounded to him.

CLOPTON, HERBERT & CHAMBERS, *contra*.

STONE, J.—It may admit of question if the paper, relied on as a power of attorney in this cause, is sufficiently explicit to uphold the confessed judgment, which this bill seeks to vacate. It is addressed, not to the person who confessed the judgment, but to Cook, the sheriff. Its whole contents are, "I propose to go on Joseph Mastin's security for costs and fine, in case he is convicted, jointly with B. R. Ingram. March 16th, 1882;" signed, "*Jas. T. Giddens*." On the next day—March 17th, 1882—defendant, Joseph Mastin, was tried and convicted, and judgment for fine and costs was entered as confessed, against Joseph Mastin, together with J. T. Giddens and B. R. Ingram. The present bill is filed by Giddens alone, who seeks to be relieved of the judgment, for defect of authority to confess it. As we have said, it is doubtful if the authority is sufficiently specific.—*Hill v. Lambert*, Min. 91; *Hodges v. Ashurst*, 2 Ala. 301; *Bissell v. Carville*, 6 Ala. 503; *Brown v. Little*, 9 Ala. 416; *Elliott v. Holbrook*, 33 Ala. 659; *M. & M. Bank v. St. John*, 5 Hill, N. Y. 497; *same v. Boyd*, 3 Denio, 257; *Freem. on Judg.* §§ 543 *et seq.*

We think, however, that the complainant must be held to have ratified the act, and to have estopped himself from setting up its invalidity. After the judgment had been rendered, after execution thereon had been levied on his property, and on the very day on which it was advertised to be sold, the complainant obtained a postponement of the sale, on his promise to pay part of the confessed judgment within thirty days, and the residue in September, 1882. This is shown by the uncontroverted testimony of the sheriff. The complainant offered no testimony, other than the writings. Under this promise, he obtained a substantial benefit. Parties invoking the powers of the Chancery Court must come in with clean hands, and show themselves equitably entitled to the relief they pray. The chancellor did not err in his final decree.—*Ryan v. Doyle*, 31 Iowa, 53; *Freem. on Judg.* § 120.

The decree of the chancellor is affirmed.

[Scaife v. Argall.]

Scaife v. Argall.*Contest as to Right of Homestead Exemption.*

1. *Occupancy of homestead.*—As a general rule, subject to statutory exceptions, occupancy is essential to support a right of homestead exemption; and this occupancy must exist at the time when, but for it, the lien sought to be enforced would attach to the property.

2. *Lease of homestead; whether an abandonment or not.*—Under the statute which declares that a leasing of the homestead, “for a period of not more than twelve months at any one time, shall not be deemed an abandonment of it” (Code, § 2843), a lease for a term of twelve months is authorized, or for several terms aggregating not more than twelve months; but, if the owner does not resume possession at the expiration of the twelve months, and has put it out of his power to do so by making a new lease to commence at the expiration of the first, the right of homestead exemption is forfeited and lost.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This was a contest as to the right to a homestead exemption, between J. F. Scaife as claimant, and Thomas M. Argall as plaintiff in execution. The property was described as “lot No. 304, in square No. 16, in the city of Eufaula;” and the evidence showed that it contained about one acre, and was worth about \$1,600. The plaintiff’s judgment was rendered on the 11th June, 1881; and an execution issued thereon, and placed in the hands of the sheriff on the 15th August, was by him levied on said lot on the 27th August. The defendant having claimed the lot, or his interest therein, as a homestead exemption, and his claim being contested by the plaintiff, an issue was thereupon made up between them, and submitted to a jury. On the trial of this issue, as the bill of exceptions shows, it was proved and admitted, that the house and lot belonged to the deceased wife of the defendant, the time of whose death does not appear, and was occupied by them as their homestead at the time of her death; that afterwards, on the 7th March, 1881, the defendant rented the property to one Bryant, until September 1st, 1881; “that Bryant occupied it a part of said term, but the trade was cancelled about the middle of the term; that defendant then rented it to L. Clisby, on the 7th September, 1881, until September 1st, 1882; that said Clisby, remained in possession until the end of the term, and was permitted to stay over until about the middle of November, 1882; that the

[Scaife v. Argall.]

defendant was not in the actual occupancy of the premises, but did have control while Bryant was not in possession, from March 7th, 1882, to November 15th, 1882, or about that time;" and it was admitted, also, that the defendant, with his family, moved into the house again after the interposition of his claim in this case, and was in possession at the time of the trial. This being all the evidence, the court charged the jury, at the instance of the plaintiffs in execution, that they must find for the plaintiffs, if they believed the evidence; and this charge, to which the defendant and claimant duly excepted, is now assigned as error.

PUGH & MERRILL, for appellant.

J. M. McKLERoy, *contra*.

STONE, J.—The general, statutory rule as to the right of homestead exemption in this State, is that it must have been "owned and occupied" by the claimant at the time it is sought to be subjected; or, correctly speaking, when a lien upon it would attach, in the absence of such occupancy.—Code of 1876, § 2820; *Hudson v. Kelly*, 70 Ala. 393. Section 2843 of the Code makes an exception as to actual occupancy. Under its provisions, "a temporary quitting, or leasing the [premises] for a period of not more than twelve months at any one time, shall not be deemed to be an abandonment of it [them] as his homestead." Temporary quitting, must mean a temporary absence, with the intention of returning; such, for illustration, as visiting a watering-place. Some persons have a summer residence in the country, and close up the residence in town during such country sojourn. This is temporary absence, the *animus revertendi* existing all the while. *Leasing the premises for a period of not more than twelve months at any one time*. But for this clause, whenever the homestead is let to rent, and the owner removes from it, there would be a cessation of his occupancy.—*Waugh v. Montgomery*, 67 Ala. 573; *Lehman, Durr & Co. v. Bryan*, 67 Ala. 558; *Stow v. Lillie*, 63 Ala. 257; *Boyle v. Shulman*, 59 Ala. 566. We think the clause we are considering must be understood as meaning, that if the owner does not in fact return and occupy the premises, until after a lapse of more than twelve months of continuous time, they being all the while in the occupancy of a tenant, or succession of tenants, holding in rightful possession, then the right of exemption is lost; and that loss must date from the time the owner, by his contract of letting, puts it out of his power to return and re-occupy, within twelve months after quitting the possession. The right of

[Walker v. Ivey.]

homestead "is conferred to protect the roof that shelters, and can not be converted into a shield of investments in lands, from which rents and profits are to be derived."—*Boyle v. Shulman, supra.*

And the homestead right, to be available, must exist at and before the date of the execution lien. Subsequent entry and occupation of the premises can not retroact, so as to give validity to the claim.—*Id.*

At the time of the levy in this case, the owner was out of possession—the premises having been let to a tenant, rendering rent, for a term of six months. The owner had also let them to like rent for another year, to commence at the expiration of the first lease. He had thus disabled himself to occupy for a continuous term of eighteen months. This was a forfeiture of his homestead exemption.

The judgment of the Circuit Court is affirmed.

Walker v. Ivey.

Trespass for Wrongful Seizure of Personal Property.

1. *Wife's statutory estate ; increase of domestic animals.*—The increase or offspring of domestic animals, belonging to the wife's statutory estate, also form a part of the *corpus*, and belong to her.

2. *Trial of right of property by magistrate, without bond or affidavit.*—A justice of the peace, before whom an attachment is returnable, has no jurisdiction to try the right or title to property levied on, at the instance of a third person who claims it, unless a claim is interposed under oath, and proceedings conducted in the manner prescribed by the statute ; and consent of the parties can not confer jurisdiction of the subject-matter of a contest so initiated and conducted.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Mrs. Theresa J. Walker, the wife of W. H. Walker, against James W. Ivey and Solomon Lee, to recover damages for the alleged wrongful taking of "ten head of hogs," the property of the plaintiff ; and was commenced on the 23d March, 1882. The cause was tried on issue joined on the plea of not guilty, and resulted, under the rulings of the court, in a verdict and judgment for the defendants. On the trial, it was proved that the hogs were seized by the defendant Lee, as constable, under an attachment in his hands against said W. H. Walker, and were delivered by him to said Ivey, his co-defendant, who was the plaintiff in the attachment. The

[Walker v. Ivey.]

plaintiff claimed the hogs as belonging to her statutory estate, and adduced evidence showing that they were the offspring of a sow which had been given to her by her father several years before the levy and seizure; and also that, at the time of the levy, both she and her husband notified the constable that the hogs belonged to her, and not to her husband. The defendants adduced evidence of declarations made by said W. H. Walker, a short time before the levy, asserting title in himself to the hogs, because they were the increase of property belonging to his wife's statutory estate. The defendants introduced evidence, also, as to an informal claim to the hogs, made by the plaintiff to the justice of the peace before whom the attachment was returnable, and his decision of the claim against her, on evidence introduced before him, on different days, by each party. No entry or record of this contest was made by the justice, and numerous exceptions were reserved by the plaintiff to the oral evidence relating to it, the substance of which is stated in the opinion of the court.

The plaintiff requested the court, in writing, to charge the jury as follows: "If the jury believe, from the evidence, that the plaintiff's father gave her a sow about four years ago, the sow thereby became her statutory separate estate, and the increase of the sow would also belong to her statutory separate estate, and she could not convey away that property in any other manner than that prescribed by the statute; that she had no lawful right to submit the right to said property to arbitration, or to waive any of her rights to said property by law; nor could she consent, by oral agreement, for the justice of the peace to try her right to such property; and that such consent, if proved, would not be binding on her, and the judgment of the justice, as proved, would not estop her from bringing this action, nor prevent a recovery in this suit." The court refused this charge, and the plaintiff excepted to its refusal; and she here assigns its refusal as error, with the several rulings on evidence, and several charges given at the instance of the defendants, to which exceptions were duly reserved.

N. W. GRIFFIN, for the appellant, cited *Gans v. Williams*, 62 Ala. 41; *Williams v. Auerbach*, 57 Ala. 90; *Thomas v. James*, 32 Ala. 723; *Sampley v. Watson*, 43 Ala. 377; Code of 1876, §§ 3676-8.

STONE, J.—1. If the testimony in the present record be believed, there can be no question that the plaintiff made out a *prima facie* case for recovery. Proving that the dam was of the *corpus* of her statutory separate estate, it followed that the

[Walker v. Ivey.]

offspring was hers. *Partus sequitur ventrem*.—*Gans v. Williams*, 62 Ala. 41; *Williams v. Auerbach*, 57 Ala. 90.

2. When the attachment was levied, both the plaintiff and her husband claimed that the property was hers. The property was carried away by the officer. A few days afterwards, they together visited the magistrate, and repeated to him that the property belonged to his wife. He, the justice, informed Mrs. Walker that, if she could prove the property was hers, she could recover it. The justice then expressed an unwillingness to try the case, and proposed to procure another justice to preside over the trial. Both plaintiff and her husband expressed confidence in the justice, and a willingness that he should try the case. No affidavit of claim had been, or ever was made, and no jury was summoned, or spoken of.—Code of 1876, §§ 3676, *et seq.* It was then agreed between the justice on one hand, and the plaintiff and her husband on the other, that the trial should be had on the next Saturday. On the day appointed, the plaintiff and her witnesses appeared before the justice, and, without a jury, offered testimony to prove her ownership of the property. The plaintiff in attachment did not attend. The justice continued the hearing until the next Monday, when the plaintiff appeared, and submitted his testimony. Thereupon, the justice decided the property was subject to the attachment. This proceeding, or trial, is relied on as an answer and defense to the *prima facie* case, which it is claimed the plaintiff had made out; and the Circuit Court so charged the jury.

We need not, and do not decide, whether it is competent for a married woman, with the concurrence of her husband, to submit to arbitration a disputed right to her statutory estate. There was no agreement to have an arbitration in this case. The plaintiff in attachment never was consulted, and made no agreement to arbitrate. Manifestly, he would not have been concluded by what was done. And it is equally manifest the plaintiff did not understand she was going into an arbitration. The negotiation and agreement between her and the justice, were not that the latter should try the case as an arbitrator, but that he should try it, instead of another justice of the peace, to be procured by him to take his place. A judicial trial was what was intended; and what the parties did, was *coram non judice*, and a nullity. The justice had no jurisdiction of the contention, in the absence of a claim interposed according to the statute, and conducted in the manner the statute prescribes. Consent can not give jurisdiction of subject-matter.

Many of the rulings of the Circuit Court are inconsistent with these views; notably, the refusal to give charge No. 2, asked by plaintiff.

Reversed and remanded.

[Brown v. The State.]

Brown v. The State.*Indictment for Murder.*

1. *Oath of grand jury; sufficiency of recitals as to*—When the record recites that the oath prescribed by the statute was taken by the foreman and the other members of the grand jury, the recital implies that the oath was administered by the court, or in its presence, and under its sanction, and is sufficient.

2. *Joinder in issue.*—The *similiter*, or joinder by the State in the issue tendered by the plea of not guilty, is merely a formal matter, and the failure of the record to recite it is an amendable defect.

3. *Special venire; presumption as to return of.*—It is not necessary that the record, in a capital case, shall show that the special *venire* was returned into court by the proper officer: when no objection was raised in the court below, based on the failure to return it, and the defendant participated in the selection of the petit jury, this court will presume that the return was properly made, or that it was waived.

4. *Sentence to penitentiary.*—Under a conviction of a felony, a sentence to *hard labor* in the penitentiary is, in substance and legal effect, no more than a sentence to imprisonment in the penitentiary, and contains no reversible error.

5. *Self-defense.*—There is no foundation in law for the proposition, that any violent assault, importing peril or injury to the person, may be resisted or repelled to the extremity of taking the life of the assailant; life may lawfully be taken, only in resistance of a felonious assault—that is, an assault threatening or imperilling life or grievous bodily harm.

6. *Dying declarations; charge as to.*—The deceased having been killed by the defendant while engaged in a hand-to-hand combat, one having a pistol, and the other a knife in his hand; the subsequent declaration of the deceased, “*I would have gotten him, if he had not been too quick for me,*” can not be regarded as the mere expression of an opinion by him, but rather characterizes, as matter of fact, both the *animus* and the avidity with which he engaged in the affray; and having been admitted by the court below as dying declarations, a charge requested, instructing the jury that they “are authorized to consider the dying declaration of the deceased, in forming their conclusions as to what might have influenced the defendant’s mind, as to the necessity of his striking or shooting for the preservation of his life, or to save himself from great bodily harm,” is improperly refused. (BRICKELL, C. J., dissenting.)

7. *Homicide in personal combat, willingly entered into by both parties.*—When two persons engage willingly in a personal combat, each having a deadly weapon, and the assailant is killed; the other party can not be held guiltless, unless he had retreated as far as he could with safety to himself; and neither the bad character of the deceased, nor past threats and hostile actions, relieve from this duty, or excuse the killing of the assailant, though they may be looked to, in connection with the present demonstrations, in determining whether the slayer had a just and reasonable apprehension of imminent peril to life, or grievous bodily harm.

FROM the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

VOL. LXXIV.

[Brown v. The State.]

The indictment in this case charged, "that Edwin J. Brown, *alias* Ed. Brown, unlawfully and with malice aforethought killed David S. Jordan, by shooting him with a pistol." The minute-entry relating to the organization of the grand jury, by which the indictment was found, contains the following recitals: "It appearing to the satisfaction of the court that there was then a sufficient number present to constitute the grand jury, and that said persons had been drawn and summoned according to law, and that they are qualified to serve as grand jurors; thereupon, T. B. Morris, having been appointed foreman of the grand jury, took the oath prescribed by law, as set forth in section 4755 of the Code of Alabama, and the other members of the grand jury took the oath prescribed by law, as set forth in sections 4755 and 4756 of the Code of Alabama; the court thereupon charged the jury, and they were placed in charge of T. A. Creighton, who was sworn as bailiff; whereupon they retired to their room." The entries showing the trial, verdict and judgment, are in these words: "This day came the State of Alabama, by its solicitor, Geo. W. Taylor, and came also the defendant, in person and by counsel, and pleads not guilty to the charge in the indictment; and thereupon came a jury," &c., "who, being duly tried, impanelled and sworn, according to law, upon their oaths do say, 'We, the jury, find the defendant guilty of murder in the second degree, and affix the penalty at ten years in the penitentiary.'" . . . "This day came the State, by its solicitor, and the defendant, Edwin J. Brown, was brought into court to receive sentence," &c., "and being personally present, he was asked by the court, if he had any thing to say why the judgment of the law should not be pronounced against him; to which he said, nothing material. It is therefore considered by the court, that the sheriff of Clarke county detain the said Edwin J. Brown, until called for by the warden or keeper of the penitentiary of the State of Alabama; and that he be delivered into the custody of the said warden or keeper; and that he be confined at hard labor in the penitentiary, for the term of ten years."

On the trial, as the bill of exceptions shows, it was proved that the difficulty between the parties, in which Jordan was killed, occurred on the 18th June, 1881, in the office of a justice of the peace, during the trial of a prosecution before him for trespass after warning, brought by Brown against Jordan and his two sons; and the particulars of the difficulty were thus stated by the justice, who was examined as a witness for the State: "After the defendant (Brown) had been sworn as a witness, and had given in his testimony, which was taken down in writing by one York, who was acting as clerk for said justice, York handed the statement to said defendant to be signed, and

[Brown v. The State.]

handed it to him on a thin piece of board (the top of a cracker-box) which said York had been using to write on; and as defendant was signing his name to his evidence, with the board in his lap, the deceased said something, which witness did not exactly understand, but thinks it amounted to an accusation of perjury; and thereupon the defendant jumped up, and struck the deceased over the head with the board, splitting it to pieces. The deceased then seized the defendant, and forced him back over the feet and legs of witness, knocking him down, and also knocking the defendant down. The deceased raised up both of his hands as Brown struck him, both hands being open, and witness saw no knife in them. Witness called to York to help to separate them, and caught hold of defendant while York caught Jordan, and pulled him back, when the defendant fired one shot while York had hold of deceased. York then turned him loose, and he started towards Brown, when Brown fired the second shot as he was rising, and the deceased then said, *'Oh, he has got me, I am killed.'* Witness then called on Brown to give up his pistol and surrender," and he did so. This witness testified, also, to repeated threats made by the deceased against Brown, and said that they had had frequent quarrels in his presence. Several other witnesses, who were present at the time, testified as to the particulars of the difficulty substantially as stated by the justice; and some of them testified to former threats by the deceased, on different occasions, and to his general reputation as a quarrelsome and violent man, though others regarded him as half-crazy and not dangerous. There was some evidence, also, tending to show that the deceased, when the difficulty commenced, had a knife in his hand.

"B. A. Clanton testified, that he was keeping the ware-house at Coffeeville when Jordan came there one night, in February, 1881, to take a steamboat, and asked for oil to grease his pistol, which he showed to witness; and said he had heard that Brown was going to take the boat there that night, and that he was going to kill him if he came. Witness advised him not to do so, but he said he would not take the advice. Witness assisted him to a neighbor's house after he was shot, where he stayed until he died. Witness did not see any knife. A day or two before his death, witness called to see him, and asked him how he was getting on; when he said, that he was mighty bad off, and knew that he was going to die. Witness told him, he reckoned not. Deceased said, *'Oh, yes, I am. I ought to have taken your advice; but I would have gotten him (Brown), if he had not been too quick for me.'* Deceased was a strong, active man, much larger and stouter than Brown; his character was that of a violent man, but witness did not know that he was a

[Brown v. The State.]

dangerous man." This was all the evidence adduced as to this declaration of the deceased.

The defendant made a statement in his own behalf, in which he stated the circumstances attending the killing, and former threats made against him by the deceased on different occasions; and further said: "I acted in self-defense in this difficulty, and I thought at the time I shot Jordan that it was necessary to shoot in order to save my own life."

The defendant requested the following charges in writing:

"1. If the jury believe, from the evidence, that Jordan was, at the time of the shooting, making an assault upon Brown, in such manner, and under such circumstances, as would create a just apprehension in the mind of a reasonable man, of imminent danger to his person, Brown had a right to act upon such appearances, and kill his assailant.

"2. If the jury believe, from the evidence, that Jordan, at the time Brown shot him, had knocked or pushed Brown down on the floor, and was advancing on him in an angry and violent manner, and under such circumstances as to impress the mind of Brown with the reasonable belief that it was necessary for him to shoot Jordan, in order to protect his own life, or save himself from great bodily harm, then they must find the defendant not guilty.

"3. If the jury believe, from the evidence, that at the time Brown shot Jordan the circumstances were such as to impress his mind with the reasonable belief that it was necessary for him to shoot, in order to save himself from great bodily harm, such shooting would be justifiable, and they must find the defendant not guilty.

"4. If the jury believe, from the evidence, that Brown killed Jordan in a sudden broil, and while Jordan was making a violent assault upon him, and that such killing was in order to repel such assault, then they must find the defendant not guilty.

"5. If the jury believe, from the evidence, that the deceased was the aggressor in bringing on the fight, by using abusive language towards Brown, and immediately advancing on him in a hostile manner; and Brown was aware that the deceased had, recently before that time, made threats of killing him; and all the circumstances at the moment were such as to impress his mind with the reasonable belief that it was necessary for him to shoot, in order to save himself from great bodily harm, or loss of life,—then the jury must find the defendant not guilty.

"6. If the jury believe, from the evidence, that the deceased brought on the fight in which he was killed, by insulting Brown with abusive language, and immediately advancing on him;

[Brown v. The State.]

and Brown was aware that the deceased had, recently before that time, made threats of killing him; and all the circumstances, at the moment Brown fired the pistol, were such as to impress his mind with the reasonable belief that it was necessary for him to shoot, in order to save himself from loss of life, or great bodily harm,—then the jury must find the defendant not guilty.

“7. The jury are authorized to consider the dying declaration of Jordan, in forming their conclusion as to what might have influenced the defendant’s mind, as to the necessity of his striking or shooting for the preservation of his life, or to save himself from great bodily harm.

“8. If the jury believe, from the dying declarations of the deceased, taken in connection with the other testimony in the case, that it was the intention of the deceased to bring on the difficulty, and take the life of Brown, or do him great bodily harm, and that he was only prevented from carrying such intentions into execution by Brown being too quick for him; then they must find the defendant not guilty.”

The court refused each of these charges, and the defendant duly excepted to such refusal; and these were the only matters to which exceptions were reserved.

WM. S. ANDERSON, A. G. SMITH, and J. J. ALTMAN, for the appellant. (No briefs on file.)

H. C. TOMPKINS, Attorney-General, *contra*..

BRICKELL, C. J.—The several objections to the regularity of the procedure in the Circuit Court have been considered, and we are not of opinion that either of them can be supported. The first is, that it is not shown by the record by whom, or by what authority, the oath was administered to the grand jury. Conceding that it is essential to the regularity of the proceedings that it should affirmatively appear of record that, before the finding of the indictment, the grand jury were properly sworn, the fact now appears clearly and fully. The recital is, that the oath prescribed by the statute was taken by the foreman, and by the other members of the grand jury; which can not be true, unless the oath was judicial—unless it was administered by the court, or in its presence, and under its sanction. In practice, it is not usual to state upon the record by whom the oath was administered to the grand or to the petit jury. The recital that they were sworn, includes the statement that the administration of the oath was by proper authority.

2. The second objection is, that the plea of not guilty tendered an issue to the country, which the record does not show

[Brown v. The State.]

was accepted or joined in by the State. The acceptance or joinder, if expressed upon the record, would have been merely an affirmation that, for trial, the State, as the defendant had done by the plea, put itself upon the country; the *similiter*, as it was known in common-law pleading, which is merely formal, and its omission an amendable defect.—1 Bish. Cr. Pr. §§ 801, 1354; 1 Chitty's Cr. Law, 720; *State v. Carroll*, 5 Ired. 139.

3. The failure to show on the record that the sheriff returned into court the special *venire*, or the list of jurors specially summoned for the trial of the cause, can not avail to reverse the judgment. If it was not in fact returned, upon objection interposed in the Circuit Court, the return would have been compelled; and whatever of benefit the appellant could have derived from it would have been afforded, and whatever of injury was apprehended from the omission would have been obviated. The objection not being interposed in the Circuit Court, and the appellant having voluntarily proceeded to trial before a jury, in the selection of which he participated, the just presumption is, that the return was made, or was waived.—*Ben v. The State*, 22 Ala. 9.

4. The remaining objection is, that the sentence condemns the appellant to *hard labor* in the penitentiary, while the legal punishment of the offense of which he is convicted is *imprisonment* in the penitentiary. The penitentiary, under the statutes, is not a mere place for the imprisonment of convicts: imprisonment in it involves subjection to involuntary or compulsory labor, during its continuance. Describing the labor as *hard*, does not signify that it shall be of unusual severity: it means no more than that it is compulsory, and continuous during the term of imprisonment. These words might well have been omitted from the sentence; but their insertion does not vitiate it, as they do not subject the appellant to any other than legal punishment, or to labor of any other kind or degree than must have been endured if they had been omitted.

5. The first and fourth instructions requested by the appellant, assume that any violent assault, importing peril or injury to the person, may be resisted or repelled, to the extremity of taking the life of the assailant. There is no foundation for such a proposition. Life can be taken lawfully, only in resistance of a felonious assault; an assault threatening or imperiling life on grievous bodily harm.—Whart. Hom. § 480; *Pierson v. The State*, 12 Ala. 149; *Eiland v. The State*, 52 Ala. 322.

7. The seventh and eighth instructions are objectionable, if for no other reason, because it is assumed the declarations proved to have been made by the deceased were *dying declarations*. It is not every declaration made by a deceased person while in

[Brown v. The Staie.]

extremis, or under a sense of impending death, that falls within the condition or class of *dying declarations*, as known in the law of criminal evidence. The subject of the declarations must be a fact or circumstance attending death, or the cause producing it. These declarations, if relevant or proper evidence for any purpose, had no reference to the facts and circumstances of the combat from which death resulted; but were, at most, only expressive of the opinion of the deceased, as to what would have been the result if the accused had not fired so quickly.

7. When the remaining instructions are taken in connection with the evidence, if they are not abstract, it is obvious they could not have been given without misleading the jury, unless other instructions explanatory of them, limiting and qualifying them, had been given. The killing was with a deadly weapon, in the course of a personal conflict, into which each party—the accused and the deceased—entered without reluctance. If it be true that the deceased was the aggressor, or assailant, the accused can not be held guiltless, until it appears that he had retreated as far as he could with safety to himself. It is the duty of one assailed, “to abstain from the intentional infliction of death, or grievous bodily harm, until he has retreated as far as he can with safety to himself.”—*Eiland v. The State, supra*; *Pierson v. The State, supra*. Neither the bad character of the assailant, nor his past threats and hostile actions, relieve from the duty. These may be looked to, in connection with present demonstrations, in determining whether the accused had a just and reasonable apprehension of immediate, imminent peril to life, or of grievous bodily harm. They do not excuse or justify the taking of life, when that could be avoided by retreating before an assault, or retiring from a combat into which the slayer enters willingly. This court will not reverse a judgment, for the refusal of instructions which have a tendency to mislead the jury.—*Dupree v. The State*, 33 Ala. 380; 1 Brick. Dig. 339, §§ 60, 61.

SOMERVILLE, J.—A majority of the court are of opinion, that the judgment of the Circuit Court in this case should be reversed, because of the refusal to give the seventh charge requested by the appellant. It is no objection to the charge, that it assumes the declaration, proved to have been made by the deceased, to have been a dying declaration. The evidence shows such to be the case, without any conflict; and the matter was so determined by the court, as a question of law, preliminary to its admission in the first instance.

The pertinent portion of this declaration is, “*I would have gotten him*” [Brown], “*if he had not been too quick for me.*”

[Perry v. Danner & Co.]

The evidence shows that Brown and the deceased were engaged in a very close hand-to-hand contest, the former using a pistol, and the latter, as some of the witnesses testify, having a knife in his possession. This declaration of the deceased does not seem to us to be the mere expression of his opinion, but rather characterizes, as matter of fact, both the *animus* and the activity with which he engaged in the affray with the view of assailing his antagonist. It had reference to the facts and circumstances constituting the affray, and producing the death of the declarant. What should be the weight or effect of this declaration, as evidence, is a matter exclusively for the determination of the jury, and on this point we abstain from intimating any expression of opinion.

For this cause the judgment must be reversed, and the cause remanded. In the meanwhile, the prisoner will be retained in custody, until discharged by due process of law.

Perry v. Danner & Co.

Action on Common Counts, for Storage of Goods.

1. *Nonsuit; when revisable.*—Under the settled construction of the statute (Code, § 3112), a voluntary nonsuit, taken in consequence of an adverse ruling on demurrer, not being a matter to which a bill of exceptions can properly be taken, is not revisable.

2. *Exception to exclusion of evidence; presumption in favor of judgment.*—When an exception is reserved to the exclusion of evidence, which is not set out, and the relevancy and materiality of which are not shown, this court will presume that it was properly rejected.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action, with several others (which were consolidated), was brought by N. W. Perry, against the persons composing the firm of A. C. Danner & Co.; and in the complaint filed in the Circuit Court, the plaintiff claimed \$62, alleged to be due by account on the 1st June, 1882, and on account stated on that day, "and for storage room by plaintiff made and provided in and about the storing and keeping of certain goods and chattels, stored and kept for said defendants on certain premises of the said plaintiff," &c. The defendants filed a special plea, as follows: "That the lumber, for the storage of which on the land described in the complaint said plaintiff sues, was kept on said land during defendants' occupancy thereof under a claim

[Perry v. Danner & Co.]

of right to the possession of said land adverse to the plaintiff's claim of right thereto; and that defendants' said adverse possession under said claim continued until it was interfered with by the process of the District Court of the United States at Mobile, sitting in bankruptcy, which court, by its interlocutory injunction, made in a certain cause therein then and yet pending, wherein one W. C. Gaynor, as assignee of said Perry and others, bankrupts, was petitioner, and these defendants were respondents, enjoined these defendants from any further holding of said lands, or other interference with them, until the further order of said court. And defendants say, that said proceeding in said court of bankruptcy is still pending and undetermined, and involves the right of said Gaynor, and said plaintiff as his pretended lessee, to the possession of said land as against these defendants, and the right of plaintiff to the possession thereof during the time sued for herein; which possession of plaintiff is merely the result of defendants' enforced obedience to the provisional, *ex parte* injunction of said court. And defendants aver, that they have made no promise or contract, as alleged in said complaint; and that said Perry entered under said writ of injunction, and under said Gaynor, the petitioner in said cause; and therefore said United States court should alone maintain cognizance of said litigation, and plaintiff should not have his said action in this court." The court overruled a demurrer to this plea, and issue being then joined between the parties, as the bill of exceptions recites, "the plaintiff, to sustain the issue on his part, offered to introduce evidence to sustain the counts of the complaint filed in the cause. The defendants objected to the same, on the ground that the same was immaterial and irrelevant, and that the only issue was the truth or falsity of the defendants' plea. The court sustained the objection, and excluded said evidence; and the plaintiff excepted to the action of the court in sustaining said objection, and in excluding said evidence. Whereupon, the plaintiff prayed, and the court granted him a nonsuit, with a bill of exceptions." The judgment-entry recites that, "on account of the rulings of the court upon the plaintiff's demurrer and offer of evidence, the plaintiff was granted a nonsuit, with leave to file his bill of exceptions."

The overruling of the demurrer to the plea, and the rejection of the evidence offered, are now assigned as error.

F. G. BROMBERG, for appellant. .

PILLANS, TORREY & HANAW, *contra*.

SOMERVILLE, J.—It may now be considered as the settled construction of section 3112 of the present Code (1876),
VOL. LXXIV.

[*Mobile Life Insurance Co. v. Pruett.*]

that when a voluntary *nonsuit* is taken by a plaintiff, under its provisions, in consequence of an adverse ruling on demurrer, such ruling on demurrer can not be reviewed in this court under this section, which is identical with section 2759 of the Revised Code of 1867.—*Mathis v. Oates*, 57 Ala. 112, and cases cited. Decisions upon pleadings, which are matters of record, and not the subject of a bill of exceptions, are not revisable under this statute.—*Rogers v. Jones*, 51 Ala. 353; *Vincent v. Rogers*, 30 Ala. 471.

We can not see that the court erred in excluding the evidence alleged to have been offered by the appellant, in support of the averments of the complaint. The record fails to show what was the nature or character of this evidence. Nor is it even stated that it was either relevant or material to the issue in dispute, or that it was not mere hearsay. We are not authorized to assume any of these facts, in order to put the court below in the attitude of making an erroneous ruling. The judgment must be presumed to be free from error, unless the record affirmatively shows the contrary.

Affirmed.

Mobile Life Insurance Co. v. Pruett.

Action on Policy of Life Insurance.

1. *Action against corporation; where brought.*—By express statutory provision (Sess. Acts 1878-9, p. 197), an action against a private corporation, founded on a transitory cause of action, may be brought in any county in which the corporation transacts business through its agents, without regard to the location of its principal office, or its ownership of real estate; and this statutory provision is not invalid on constitutional grounds.

2. *Policy of life-insurance; conditions as to payment of premiums.*—A policy of life-insurance, in the usual form, is not an assurance for a single year, with a privilege of renewal from year to year, by paying the annual premiums, but is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums; and while the payment of the annual premiums, on the day specified, is not a condition precedent, the time of payment is of the essence of the contract, and non-payment *ad diem* involves absolute forfeiture.

3. *Parol evidence; admissibility to vary written.*—When a contract is reduced to writing, the written memorial becomes the sole expositor of its terms, and all antecedent negotiations and agreements are merged in it; and oral evidence of such antecedent negotiations and agreements can not, in the absence of fraud or mistake, be received to contradict the recitals of the writing.

[Mobile Life Insurance Co. v. Pruett.]

4. *Same; as to terms of policy of insurance.*—This rule applies to a policy of life-insurance, and forbids the admission of oral evidence to contradict or vary the terms of the policy, as to the time or place at which the annual premiums are payable, the consequences of non-payment on the day specified, and other material stipulations therein expressed.

5. *Alteration of contract.*—Though the terms of a written contract can not be contradicted or varied by proof of inconsistent verbal agreements made contemporaneously or previously, it may be modified or rescinded by a subsequent verbal agreement; and the mutual assent of the parties is a sufficient consideration to sustain such modification or rescission.

6. *Modification of policy by subsequent dealings; waiver of forfeiture.* In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the non-payment of annual premiums on the day specified, the test is, whether the insurer, by his course of dealing with the assured, or by the acts and declarations of his authorized agents, has induced in the mind of the assured an honest belief that the terms and conditions of the policy, declaring a forfeiture in the event of non-payment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been thus induced, and the insured has acted on it, the insurer will not be allowed to insist on the forfeiture.

7. *Same; taking note for premium, and extending day of payment.* When a promissory note is accepted for the first premium, and the day of payment is afterwards extended by special agreement, these facts, without more, do not justify the inference by the assured that similar indulgence will be granted as to other premiums when they fall due.

8. *Acceptance of premium after forfeiture.*—The acceptance of a premium by the insurer or his authorized agent, after a forfeiture has been incurred by non-payment on the day specified, if made with knowledge of the facts, is a waiver of the forfeiture; but this effect can not be attributed to the acceptance of a premium by an agent of the insurer, after the death of the person assured, when it is shown that the fact of such death was known to the person who made the payment, but was not known or communicated to the agent.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Wm. H. Pruett against the appellant, a domestic corporation, and was founded on a policy of insurance, which the plaintiff had effected with said corporation, on the life of his wife, Mrs. Ann B. Pruett. The assured died on or about the 10th November, 1880, and the action was commenced on the 31st January, 1881. The policy was for \$2,500, and was dated the 19th April, 1879; the annual premium was \$6.12, "to be paid on or before the 31st day of October in every year, during the continuance of this policy;" and the following conditions and stipulations were contained in it: "This policy is issued by said company, and is accepted by the assured, on the following express conditions and agreements: . . . 2. That the several payments herein specified to be made by the assured shall be made, in lawful money of the United States, and not otherwise, on or before the days upon which they become due, at the office of said company in

[Mobile Life Insurance Co. v. Pruett.]

the city of Mobile, or to their duly authorized agents, when they produce receipts signed by the president, vice-president, or secretary of said company; and that in case of default in said payments, or either of them, then this policy shall become void, and all payments made thereon shall be forfeited. . .

7. That this policy shall not take effect, until the first payment of premium shall have actually been made, during the life of the assured; that any alteration or waiver of the conditions of this policy, unless made at the home office, and signed by the president, vice-president, or secretary of said company, shall not be considered as valid; and that the receipt of any thing by an agent, excepting lawful money of the United States, in settlement of premiums, shall not be considered as binding on said company, unless specially agreed to; which agreement must be indorsed hereon, and signed by an officer of said company." The following memoranda were also printed on the back of the policy: "*Conditions of payments of premiums:* The premiums on this policy due and payable at the office of the company in Mobile, Alabama; but, for the convenience of the policy-holder, the company may, unless otherwise requested, transmit to the agent, through whom this policy was issued or last renewed, the receipts for renewal premiums, to be delivered on payment of the stated premium; and the assured is hereby notified, that the only evidence to him, of the authority of any agent to receive any premiums on account of this policy, is a receipt in printed form, signed by the president or secretary of this company, and countersigned by the agent to whom the money is paid."

The defendant filed four special pleas in abatement, each averring, in substance, that it was a freeholder of the county of Mobile, having its residence, office and principal place of business in the city of Mobile, and was not subject to be sued in any other county. The court sustained demurrers to each of these pleas, and the defendant then pleaded the general issue and several special pleas in bar, averring that the policy had become forfeited and void, before the death of the assured, by reason of the non-payment of the annual premium due and payable on the 31st October, 1880. The plaintiff took issue on the first plea, and replied to the several special pleas, averring a waiver of the prompt payment of the premium at maturity, and its subsequent payment to an authorized agent of the defendant, and the retention of such payment by the defendant. Demurrers were interposed to each of these replications, and numerous causes of demurrer specially assigned: all of which the court overruled, and held the replications sufficient. The opinion of this court renders it unnecessary to set out these pleadings in detail.

[Mobile Life Insurance Co. v. Pruett.]

On the trial, as the bill of exceptions states, the plaintiff testified as a witness for himself, "among other things, that on the 3d April, 1879, T. G. Fowler, the general State agent of the defendant company, called on him at Batesville in said county, where he resided, and solicited him to take policies on his own and his wife's lives; that he agreed to take a policy for \$2,500 on each, and made applications for them in the usual form, and gave said applications to said Fowler, to be forwarded to the home office in Mobile, for acceptance or rejection; that he and his wife then and there executed and delivered to said Fowler, in payment of the first year's premiums on said policies, their joint waiver promissory note, payable to said company, or its order, at Uniontown, Alabama, for \$148.53, being the amount of the premiums, with interest to date of payment of note; that said note was not paid on October 1st, 1879, when it fell due, but was extended to November 1st, in accordance with an agreement made and indorsed on the back thereof." The note was here produced, and was offered in evidence; the indorsement on it, which was signed by said T. G. Fowler, being in these words: "I have agreed that this note shall be extended to November 1st, 1879, if Mr. Pruett should desire it."

"Plaintiff further testified, also, that after he had given said applications to Fowler, and had signed and handed the note to him, his attention was called to the fact that said note was made payable at Uniontown, and he told Fowler that he would not take the policies, if he had to pay his note for future premiums in Uniontown; that said Fowler then and there agreed to send the note to H. C. Jernigan, the local agent of said corporation at Three Notch road, about thirty miles distant from plaintiff's home and place of business, and would require said Jernigan to call on plaintiff for payment of said note, and for future premiums due on the policies; that he then told Fowler to forward the applications, and again received them from him, through the mail, a few days after their date, April 19, 1879. Plaintiff testified, also, that said note was not paid at maturity, nor until about the latter part of January, or the first part of February, 1880, and was then paid to said H. C. Jernigan, who presented said note to plaintiff in person, coming to Batesville to do so; that about the 29th January, 1880, he paid to said Jernigan an irregular premium on said policies, carrying them from April 19th to October 31st, 1880, by giving the joint waiver note of himself and his wife to said Jernigan, payable October 31st, 1880. And plaintiff introduced the receipt for this premium," which was dated Mobile, October 31st, 1879, acknowledged the receipt of \$38 "for irregular annual premium on policy No. 8,169, issued by this company, on the life of Ann B. Pruett, of Batesville, Alabama, which continues said policy in force until

[Mobile Life Insurance Co. v. Pruett.]

the 31st day of October, 1880;" and was signed by "*H. M. Friend*, secretary," but declared on its face, "This receipt is not binding, until countersigned by T. G. Fowler, agent at Uniontown.

"Plaintiff, resuming his testimony, further stated, that said note was not paid at maturity, and is not yet paid: that Mrs. Ann B. Pruett, the assured, died on 10th November, 1880, ten days after the annual premium for the year beginning October 31st was due; that said Jernigan never did call on plaintiff or his said wife, in accordance with the agreement between himself and said Fowler, for the payment of the note due October 31st, 1880, nor for the premium due on that day; that he wrote to said Fowler on the 13th November, 1880, and informed him of the death of his said wife; that afterwards, to-wit, on November 24th, 1880, he was informed by said Fowler that the company had declared the policy forfeited for non-payment of the premium due October 31st, 1880, and declined to pay it; that on the 26th November, 1880, he (plaintiff) went to Three Notch road, and paid the sum of \$140.99, with interest from October 31st, to said H. C. Jernigan, defendant's agent, and told him the said amount was for a premium due on said policies October 31st, 1880, and took said Jernigan's receipt therefor; and that he did not, when he paid this money, inform said Jernigan that Mrs. Pruett was dead, nor that the defendant company had declared the policy forfeited." The receipt, which was produced, was signed "*Theo. G. Fowler*, St. agent, by *H. C. Jernigan*."

"The defendant, having objected, from time to time, to the introduction of much of this evidence as it was introduced, which objections were overruled, now moved the court as follows: 1. To rule out and exclude from consideration by the jury all of plaintiff's said testimony relating to the agreement stated to have been made with said Fowler, as to the manner of the payment of the premiums on the policies, because it was contradictory of the written policy shown to have been entered into subsequently, and because it was irrelevant and immaterial to the issue. The court overruled and refused this motion, and the defendant excepted. 2. The defendant then further moved the court to rule out and exclude from consideration by the jury all of plaintiff's said testimony relating to the indulgence given on the note dated April 3d, 1879, its time, place, and manner of payment (except wherein the note itself gave an extension of time on application), because such testimony contradicts and varies the written contract of insurance entered into after said note was given, and contradicts and varies the express terms of the note itself; and because said testimony was irrelevant and immaterial to the issues. The

[*Mobile Life Insurance Co. v. Pruett.*]

court overruled and refused this motion, and the defendant excepted. 3. The defendant then further moved the court to rule out and exclude from consideration by the jury the paper writing given to plaintiff by said Jernigan on the 26th November, 1880, purporting to be a receipt for premiums due October 31st, 1880, because it was not shown that said Jernigan had authority to give out a receipt not signed by the president, vice-president, or secretary of said defendant company; and because it contradicts and varies the terms of the policy; and because it is in express violation of the terms of the policy. The court overruled said motion, and refused to exclude said evidence; and the defendant excepted to this ruling.

"The defendant then introduced said H. C. Jernigan as a witness, and proposed to prove by him in these words: that he was not in the habit of giving out receipts for premiums as agent of said defendant company, unless such receipts were first signed by the president, vice-president, or secretary of said company; and that said receipt so given to plaintiff, dated November 26th, 1880, was the only one that he ever gave out that was not signed by the president, vice-president, or secretary of said company. The plaintiff objected to this testimony, and the court sustained the objection, and excluded the evidence; to which ruling the defendant excepted. The defendant offered to prove by said Jernigan, also, that he, as the local agent of the defendant company, had no power or authority to issue a receipt for renewal premiums on any policies, unless such receipts were first signed by the president, vice-president, or secretary of said company. Plaintiff objected to this evidence also, and the court excluded it; to which ruling the defendant excepted. The defendant then offered to prove by said Jernigan, that he, as the agent of said defendant company, had never been in the habit of receiving and receipting for premiums on policies, in any other manner than that provided in the policies themselves. The plaintiff objected to this evidence, and the court sustained the objection; to which ruling, excluding said evidence, the defendant excepted."

The rulings of the court on the pleadings, and the several rulings on evidence to which exceptions were reserved, are now assigned as error.

JNO. D. ROQUEMORE, and MACARTNEY & CLARKE, for appellant.—(1.) By express constitutional provision, "corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons."—Art. xiv. § 12. The purpose and policy of this provision, in harmony with other provisions in the same instrument, is to place natural and artificial persons on an exact equality before the law—to confer

[Mobile Life Insurance Co. v. Pruett.]

the same rights and privileges on each, and to prevent any unjust discrimination; and this construction has received the sanction of this court.—*S. & N. Ala. Railroad Co. v. Morris*, 65 Ala. 193; *Ala. Gold Life Ins. Co. v. Cobb*, 57 Ala. 547. The right to sue, and the liability to be sued, “in all courts, in like cases as natural persons,” necessarily involves and secures the use of the same process, the same modes and forms of proceeding, the same rules of pleading, practice, and evidence. Less than this is not legal equality. The general statute (Code, § 2928) secures to every freeholder the right to be sued only in the county in which he has a permanent residence; while the recent statute, approved February 13th, 1879, attempts to take away this right from corporations, foreign and domestic alike, and subject them to suit in any county in which they transact business through agents. A domestic corporation is a resident and citizen of the State by which its charter is granted; and when it owns real estate in the county in which its principal place of business is situated, it is a freeholder of that county. *Telegraph Co. v. Pleasants*, 46 Ala. 645; *Louisville v. Letson*, 2 How. 497; *Ontario Bank v. Bunnell*, 10 Wendell, 186; *People v. Utica Ins. Co.*, 15 Johns. 358; *Sherwood v. Railroad Co.*, 15 Barb. 650; 2 Gall. 105; 10 How. Pr. 403; *Morris v. Hall*, 41 Ala. 510.

2. The replications to the several pleas in bar were defective in form and substance. The prompt payment of premiums is of the very essence of contracts of life-insurance; and whether it be held a condition precedent or subsequent, the company has a right to insist upon payment *ad diem*, and to declare and enforce a forfeiture, as stipulated, in the event of non-payment. *May on Insurance*, 406; *Bliss on Life Insurance*, 257-74; *Thompson v. Life Ins. Co.*, 14 Otto, 252; *Insurance Co. v. Davis*, 95 U. S. 425; *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24. The alleged oral agreement, as to where and how the premiums might be paid, was made before the policy was issued, and can not vary its terms.—*Thompson v. Life Ins. Co.*, 14 Otto, 252; *Sullivan v. Cotton States Ins. Co.*, 3 Big. Ins. Cases, 543, or 43 Geo. 423. The policy required that the premiums should be paid at the domicile of the company in Mobile, and to an authorized agent having a receipt signed by one of several named officers; and the payment to Jernigan fulfilled neither of these conditions.—95 U. S. 425; *Bouton v. Amer. Life Ins. Co.*, 25 Conn. 542; *Catoir v. Amer. Life Ins. Co.*, 4 Vroom, N. J. 487. The parties should be held strictly to the contract made by them.—14 Vesey, 428; 93 U. S. 24; 100 Mass. 500. If this oral agreement were valid for any purpose, it could not extend the time of payment of the premium beyond the death of the assured and notice to the beneficiary that

[*Mobile Life Insurance Co. v. Pruett.*]

the policy had been cancelled. No contract was in force after the cancellation of the policy and notice thereof; and the subsequent payment to Jernigan could neither revive the old contract, nor make a new one.—*Ins. Co. v. Mowry*, 96 U. S. 544; *Want v. Blunt*, 12 East, 183; 8 Geo. 534, or 1 Big. Cases, 83; 2 Common Bench, N. S. 257; 3 *Ib.* 622. The acceptance of the premium by Jernigan, under these circumstances, was not a waiver of the forfeiture.—*Bennecke v. Insurance Co.*, 105 U. S. 359; *Security Ins. Co. v. Fay*, 22 Mich. 467.

3. The court erred, also, in its several rulings on the evidence. The verbal agreement, to which the plaintiff was allowed to testify, was merged in the written policy afterwards accepted, so far as inconsistent with the terms of that policy. *White v. Ashton*, 51 N. Y. 280; *Insurance Co. v. Mowry*, 96 U. S. 544; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxton*, 28 Mich. 159; Bigelow on Estoppel, 437-41. The oral evidence as to the indulgence given on the note contradicted the terms of the written contract, and ought to have been ruled out.—104 U. S. 252; 4 Vroom, N. J. 487, and other authorities *supra*. The receipt given by Jernigan, under the circumstances proved, was not competent evidence.—95 U. S. 425; 25 Conn. 542; 4 Vroom, 487; 105 U. S. 359; *Powell v. Henry*, 27 Ala. 612; *Railroad Co. v. Jay*, 65 Ala. 113. The testimony of Jernigan was admissible, certainly in rebuttal of plaintiff's own testimony as to the same matters.—96 U. S. 234; 96 *Ib.* 84; 4 Vroom, 487.

PUGH & MERRILL, *contra*.—1. A corporation is an incorporeal entity, incapable of having a permanent place of residence, or being domiciled at any one place, but acting only through its agents, and residing wherever they reside or act, at least for the purposes of suit; and if it has several places of business, it is deemed in law a resident of each of them, for the purposes of venue in personal actions.—*Hudson River Railroad Co. v. Pond*, 17 How. Pr. 543. The statute which exempts a citizen who is a resident freeholder from liability to suit in any other county than that of his residence (Code, § 2928), is an exception to the general law regulating the venue in transitory actions, and is founded on principles of high public policy, involving the performance by such citizens of public duties which can not be devolved on corporations.

2. The forfeiture clause in a policy of insurance, like other forfeitures, is looked on with disfavor by the courts; and being intended for the benefit of the insurer, slight evidence of waiver on his part is sufficient to show that it has been waived; and this may be done either by express agreement, or by proof of subsequent dealings on which the insured relied, on which

[Mobile Life Insurance Co. v. Pruett.]

he had a right to rely, and which were calculated to make him believe that prompt payment would not be insisted on.—*Life Ins. Co. v. Norton*, 96 U. S. 234; *Ripley v. Etna Ins. Co.*, 29 Barb. 557; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, or 27 Amer. Rep. 443; *Mayer v. Life Ins. Co. of Chicago*, 38 Iowa, 304, or 18 Amer. Rep. 34; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; 18 Barbour, 541; *Murphy v. So. Life Ins. Co.*, 3 Baxter, 440, or 27 Amer. Rep. 761; 73 N. Y. 516, or 29 Amer. Rep. 200; *N. Y. Life Ins. Co. v. Eggleston*, 96 U. S. 572; *Insurance Co. v. Wolfe*, 95 U. S. 326; *Miller v. Life Ins. Co.*, 12 Wallace, 285; 13 Wallace, 222; *Helme v. Phil. Life Ins. Co.*, 61 Penn. 107; *Henley v. Life Asso.*, 69 Mo. 380; 77 Ill. 384; *Ins. Co. v. Davis*, 95 U. S. 425; *Knight v. Rowe*, 2 Car. & P. 246; *West v. Blakeway*, 2 Man. & Gr. 729; *Leslie v. Knickerbocker Ins. Co.*, 63 N. Y. 27; *Cotton States Ins. Co. v. Lester*, 62 Geo. 247, or 35 Amer. Rep. 122; *Ins. Co. v. Pierce*, 75 Ill. 426; *Thompson v. Ins. Co.*, 52 Mo. 469; *Ins. Co. v. Wagner*, 80 Ill. 410; *Ins. Co. v. Robertson*, 59 Ill. 123.

3. The acceptance of the note operated as a payment of the premium, so far as to keep the policy alive.—*Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, or 27 Amer. Rep. 443; *McAllister v. Mutual Life Ins. Co.*, 3 Amer. (101 Mass.) 404. These authorities, and those above cited, abundantly show that parol evidence is admissible to prove that, by agreement, a different time and place was fixed for the payment of the premiums from that named in the policy. The policy was in force on the 31st of October, although the note was not then paid, and the company had no right to declare a forfeiture on that day without notice to the assured.—*Mayer v. Mutual Life Ins. Co.*, 38 Iowa, 304. Both Fowler and Jernigan were held out to the world by the defendant as its agents, and the contract here sued on was contracted through their agency; and the defendant will not be allowed to disown its responsibility for their acts.—*Insurance Co. v. McCain*, 6 Otto, 84; *Piedmont & Arlington Life Ins. Co. v. Young*, 58 Ala. 476. Even if Jernigan had no authority to receive the money, the retention of the money by the defendant is a ratification of his unauthorized act. The provision in the policy in reference to the signature to receipts, being intended for the protection and benefit of the company, might be waived by it, and was waived on the facts proved.

BRICKELL, C. J.—The demurrers to the pleas in abatement were properly sustained. A suit against a corporation, foreign or domestic, may be maintained, when in its nature the cause of action is transitory, founded upon a matter or transac-

[Mobile Life Insurance Co. v. Pruett.]

tion which might have taken place anywhere, in any county in which the corporation transacts business by agents, without regard to its proprietorship of real estate, or its principal place of business.—Sess. Acts 1878-9, p. 197; *Home Protection Ins. Co. v. Richards*, ante, p. 466.

The policy of life-assurance, upon which the action is founded, “is not an assurance for a single year, with a privilege of renewal from year to year, by paying the annual premium, but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for the non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character.”—*New York Life Insurance Co. v. Statham*, 93 U. S. 24. Speaking of a similar policy, it was said in *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 551: “The policy, by its terms, is forfeitable—is to cease and determine, and the insurer to be freed from all liability—if the annual premiums were not paid when they became due and payable. The continuance of the policy as a contract—its life—depended on the prompt payment of the premiums. The payment was manifestly the *condition precedent*, on which the parties respectively stipulated for its continuance, and on the non-performance of which they assented to its extinction.” There are many authorities holding that, by the payment of the first premium, an insurance for one year is obtained, with a right to its continuance from year to year during life, upon the payment of the stipulated premiums. The subsequent payments rest in the option of the assured, and payment *ad diem* is therefore a *condition precedent* to continuous liability of the insurers. In the case first referred to, and in subsequent cases, the Supreme Court of the United States have rejected the theory, that the condition is *precedent*, declaring it *subsequent*; and we prefer to follow its decisions upon this point. All the authorities agree, that the time for payment is material—is of the essence of the contract; and non-payment at the day appointed involves absolute forfeiture, when, as in the present case, such are the express terms of the contract.—*New York Life Ins. Co. v. Statham*, supra.

The stipulation of the policy is not only for the payment of the premiums at times stated, but the place of payment (the office of the company in the city of Mobile) is appointed, unless payment is made to an agent of the company, producing a receipt signed by the president, vice-president, or secretary. The verbal agreement, of which the Circuit Court received evidence, made with Fowler, the agent of the company soliciting the insurance, through whom the application for the policy was forwarded, is in direct variation and contradiction of these clearly expressed terms of the policy, and, if it is of any validity,

[Mobile Life Insurance Co. v. Pruett.]

changes the legal effect of the contract, and the duties and obligations of the insurer and the assured. The premiums are not payable at stated times, but on the demand of the company; the assured is not bound to take notice when the premium is payable, but can await notice of the fact from the insurer; the place of payment is not that appointed in the policy, but is transferred to a point at or near the domicile of the assured; and payment may be made to an agent, upon any receipt the assured chooses to take, though he does not obtain a receipt signed by either of the designated officers of the company.

When a contract is reduced to writing, the written memorial becomes the sole expositor of its terms; all antecedent negotiations, agreements, or understandings, are merged in it; and to vary or contradict it, evidence of them is not admissible, unless it be clearly shown that a party was by fraud induced to enter into the contract, or that by mistake the intention of the parties is not expressed.—*Mead v. Steger*, 5 Port. 498; *Paysant v. Ware*, 1 Ala. 160; *Hair v. LaBrouse*, 10 Ala. 548. A policy of life-insurance is within the influence and operation of this conservative principle, and the presumption is conclusive, that in it all prior verbal negotiations, agreements, or arrangements are merged. It is usually prepared with much care, for the purpose of embodying the entire agreement of the parties—to withdraw from the uncertainty of parol evidence all the terms and conditions of the contract, and the rights, duties and obligations of the respective parties, that future controversy may be avoided. The amount of the premium, when and where it is payable, the consequence of default in payment, the event upon which the principal sum is payable, and its amount, are all expressed clearly in the policy. It was issued after the verbal agreement of which evidence was received, and was without objection accepted and retained by the assured. The most painful uncertainty would attend such contracts, if it was not taken and accepted as the entire engagement of the parties, and all mere parol evidence of prior agreements or negotiations was not excluded.—*Ins. Co. v. Mowry*, 96 U. S. 547; *Thompson v. Ins. Co.*, 104 U. S. 259. The evidence of the parol agreement imputed to the agent Fowler, before the issue and delivery of the policy, ought to have been excluded.

A contract in writing can not be varied or contradicted by evidence of prior or contemporaneous inconsistent verbal agreements, but it may, by parol agreements made subsequently, be rescinded or modified; and to support the rescission or modification, no other consideration is necessary, than the mutual agreement of the parties. The condition for the payment of the premiums at the times stated, and the place appointed, was

[Mobile Life Insurance Co. v. Pruett.]

inserted for the benefit of the company; and if a breach of the condition occurred, upon its election it depended whether advantage of it would be taken, or whether it would be waived; or, before forfeiture, by a new agreement, express or implied, payment at the time and place fixed could be waived or dispensed with, and some other mode of payment substituted. There is often much of difficulty, in the absence of written evidence of a new agreement—when the agreement is to be inferred or implied from circumstances, or dispensing or waiving a forfeiture is matter of deduction from the acts or declarations of the parties—in determining whether there has been a new agreement made, or there has been a dispensation or waiver of the forfeiture, because of the failure to comply strictly with the requirements of the policy. The true test is, whether the insurer, by the course of dealing with the assured, or by his acts or declarations, or by the acts or declarations of his authorized agents, has induced the honest belief in the mind of the assured, that the terms and condition of the policy providing for a forfeiture, if payment of the premiums is not made at the time, and in the manner appointed, will not be enforced, but that payment will be accepted, if made at another time, or in another manner. Having induced such belief, if the assured in good faith relies upon it, intending to make payment in accordance with it, justice and morals forbid that the insurer should take advantage of a forfeiture that would not have occurred, if he had not induced it.—*Ins. Co. v. Wolff*, 95 U. S. 326; *Thompson v. Ins. Co.*, 104 U. S. 252; *Ins. Co. v. Norton*, 95 U. S. 234; *Ins. Co. v. Mowry*, *Ib.* 544; *Ins. Co. v. Eggleston*, *Ib.* 572; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30.

Excluding from consideration, as we must, the antecedent verbal agreement, imputed to the agent Fowler, no fact or circumstance is shown, calculated to induce in the mind of the assured a reasonable belief that payment of the premiums in any other mode, or at any other time, than that stated in the policy, would be accepted by the company. The acceptance of a note for the first premium, and the subsequent extension of the day of its payment, was an arrangement in reference to that premium only; and unless a similar note had been taken for a subsequent premium, it afforded no room for a belief that a like indulgence would be given as to the payment of such premium.

A receipt of a premium, after a breach of the condition for its payment has occurred, is, doubtless, a waiver of the forfeiture. The payment must, however, be made to the insurer, or to an agent having authority to receive it. And it must be made fairly and honestly; there must be no misrepresentation or concealment of material facts known to the party making

[Robbins v. Battle House Company.]

the payment, of which the insurer can not reasonably be presumed to have knowledge. Passing all consideration of the fact, that there is not, probably, legitimate evidence that Jernigan had authority to receive payments of past-due premiums, waiving consequent forfeitures, the payment made to him was subsequent to the death of Mrs. Pruett, and after the assured had been informed that the policy was forfeited by the failure to pay the premiums according to its terms. This fact, and the death of Mrs. Pruett, were not communicated to Jernigan, when he received the premium. It is not too much, probably, to say the inference is irresistible, that they were purposely concealed from him. When the death of the assured occurs, after a failure to pay a premium according to the terms and conditions of the policy, acts of an agent of the insurer done in ignorance of the death, which might otherwise constitute a waiver of the consequence resulting from the failure to pay the premium, are not of any effect.—Bliss on Life Ins. § 190.

We have not deemed it necessary to pass upon the numerous questions arising from the rather voluminous pleadings found in the record; there is no necessity for it, and no practical benefit could result from it. What has been said, will enable the Circuit Court, on another trial, to make a just and legal disposition of the case.

Reversed and remanded.

Robbins v. Battle House Company.

Bill in Equity for Reformation of Lease.

1. *Reformation of writing on ground of mistake; previous request and refusal to correct.*—Where the alleged mistake is disputed by the defendant, or where a request to correct it would have been vain and useless, a bill in equity may be maintained without alleging such previous request and refusal; and the court, doubting the correctness of the rule laid down in *Long v. Brown* (4 Ala. 622), which was followed in *Beck v. Simmons* (7 Ala. 71), and *Lamkin v. Reese* (7 Ala. 170), “submits if it is not a much better rule, in all such cases, to retain the bill until the correction is made, and if the bill was filed without previous request, and unnecessarily, let the costs be taxed against the complainant.”

2. *Answer construed, as to admission of mistake and offer to correct.* These averments, in an answer to a bill for the reformation of an alleged mistake in a written lease: “Defendant has never refused to reform said lease, and to make the necessary correction in it, and alleges that no application was ever made to respondent by complainant to do so, and that he would, at any time, if applied to, have corrected any mistake in said lease, and is still ready and willing to do so, if applied to by complainant.”

[Robbins v. Battle House Company.]

ant,"—fall very far short of admitting the alleged mistake, and offering to correct it.

3. *Injunction of judgment in unlawful detainer, but not writ of restitution.*—The unsuccessful defendant in an action of unlawful detainer, having taken an appeal to the Circuit Court, and then filed a bill in equity to correct an alleged mistake in his lease, may restrain the further prosecution of the action at law until the determination of the suit in equity; but, not having given a *supersedeas* bond (Code, § 3711), the issue of a writ of restitution on the judgment will not be enjoined in the meantime.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 10th April, 1884, by Martin C. Robbins, against the Battle House Company, a domestic corporation, the owner of the property in Mobile known as the Battle House; and sought the reformation of the complainant's lease of the property, by the correction of an alleged mistake in the description of the leased premises, and an injunction of further proceedings under a judgment, in an action of unlawful detainer for the possession of the property, which the defendant had recovered before a justice of the peace. The lease, a copy of which was made an exhibit to the bill, was for the term of five years, commencing on the 1st October, 1880, and ending on the 1st October, 1885; and the leased premises were therein described as "all the second story of the building known as the Battle House, and all the bar-room, billiard-room, bath-rooms, laundry, and all parts and portions of said Battle House on the first floor which are now used by M. C. Robbins as a part of the hotel, for use and occupation by said lessees as a hotel." The bill alleged that the lease was intended to include the entire hotel building (except certain parts of the first floor), embracing the second, third, fourth and fifth stories; that the written lease failed to describe the premises correctly through a mistake on the part of the draughtsman, since deceased, who was the president of the defendant corporation; that the lessees were placed in possession of the entire property under the lease, and the complainant continued in the uninterrupted possession until the institution of the action of unlawful detainer against him; that the mistake in the lease was not discovered by the complainant until on the trial of that action, when the attorney for the plaintiff corporation insisted that the lease only covered the designated parts of the building, and the justice of the peace so ruled and decided. The bill alleged, also, that the complainant had taken an appeal from the judgment of the justice of the peace, but would be unable to defend his possession as to the portions of the premises omitted from the lease, on the trial in the Circuit Court, without a reformation of the lease; and he therefore prayed that the lease might be reformed, and that the defend-

[Robbins v. Battle House Company.]

ant might be enjoined and restrained "from further prosecuting said judgment in said unlawful detainer suit, and from suing out any writ of possession or execution thereon for the enforcement of said judgment."

The action of unlawful detainer was commenced on the 24th March, 1884; and the judgment of the justice of the peace, which was rendered on the 2d April, 1884, was in these words: "Came the parties," &c., "and issue being joined, and trial had, upon the evidence and full consideration thereof, I find the said Martin C. Robbins guilty of an unlawful detainer, as complained against him by said Battle House Company; and I therefore order and adjudge, that said M. C. Robbins restore to the said Battle House Company the possession of the said tenement, and every part and portion thereof, mentioned in the complaint—say, that certain tenement in Mobile known as the Battle House, also the bar-room, billiard-room, bath-rooms, laundry, and all portions and parts of said building on the first floor as are used as part of the hotel, and all of the second story of said building known as the Battle House, and also the second, third, fourth and fifth stories; and that the defendant pay the costs of this proceeding."

The defendant filed an answer to the bill, incorporating therein a demurrer for want of equity; one of the causes of demurrer specially assigned being "that said bill fails to allege that the complainant ever applied to the defendant to reform said lease, or to correct said alleged mistake therein." As to the existence of the alleged mistake in the written lease, the answer contained these averments: "It is true that the complainant has, since October, 1880, used and occupied the whole of said building, except certain portions of the first floor, as a hotel. It is also true, however, that said lease only covers the second story of said building, and certain designated rooms of the first floor; and that said lease was drawn up by Thomas N. Macartney, then the president of said company, who is now dead. What his intention was in leasing said hotel partly by written lease, and partly by verbal lease, this defendant does not know, and can not account for it. He may have intended to include in the lease the whole of the Battle House building, that is to say, the third, fourth and fifth stories thereof; and defendant believes that such was the intention, and that they may have been omitted by mistake, accident, or inadvertence; but this defendant has no means of knowing what the contract of renting was, further than is shown by said written lease. Defendant says that complainant signed said lease in his individual name, and has had possession of it for more than three years and a half last past, and must have well known its contents and terms; and yet he has never applied to this defendant

[Robbins v. Battle House Company.]

to reform said lease, or to correct any mistake therein alleged to have been made. And defendant says that, although the fact that said written lease does not include the third, fourth and fifth stories of the building, was directly brought to the attention of the complainant on the trial of said action before the justice of the peace, yet complainant did not then, and has not since that time, applied to defendant to reform said lease, or to correct said alleged mistake. . . . Defendant shows that it has never refused to reform said lease, and to make the necessary correction in it, and it shows that no application was ever made to it by complainant to do so; and defendant says that it would, at any time, if applied to, have corrected any mistake in said lease, and is still ready and willing to do so, if applied to by complainant."

After answer filed, the chancellor dissolved the injunction, on motion, citing *Hamilton v. Adams* (15 Ala. 596), and *Powell v. Plank-road Co.* (24 Ala. 441); and his decree is now assigned as error.

R. P. DESHON, for appellant.—A court of equity will reform a written instrument, so as to make it speak the intention and true contract of the parties; and will restrain proceedings at law, founded on the defective instrument, until the mistake is corrected. It is admitted that, generally, before filing a bill to correct a mistake, the party must make application to his adversary for a voluntary correction of it; but, where the mistake is only discovered on the trial of the action at law, when it is urged as a ground of recovery, it operates in the nature of a surprise, and the injured party may at once file his bill to enjoin the judgment. He is not chargeable with *laches* until the discovery of the mistake.—*Reynolds v. Dothard*, 7 Ala. 667. The complainant is in possession under his lease, and has taken an appeal from the judgment of the justice; but he can not successfully defend his possession in the Circuit Court, without a reformation of the lease, any more than he could before the justice. A judgment in an action of unlawful detainer may be enjoined like any other judgment.—*Lamb v. Drew*, 20 Iowa, 15. A sufficient ground to restrain the further prosecution of the action at law, necessarily involves and requires an injunction against the issue of a writ of possession, or restitution; otherwise, the complainant may be turned out of his possession, and kept out of possession for the remainder of his term, awaiting the result of this suit; a result which would work irreparable injury to him, while the defendant can at any time avoid delay by admitting and correcting the mistake.

TOULMIN, TAYLOR & PRINCE, *contra*.—There is no equity in
VOL. LXXIV.

[Robbins v. Battle House Company.]

the bill, because it shows that the complainant has never applied to the defendant for a correction of the alleged mistake in the lease, and that the defendant refused to correct it. *Long v. Brown*, 4 Ala. 622; *Lamkin v. Reese*, 7 Ala. 170; *Beck v. Simmons*, 7 Ala. 71; Kerr on Fraud & Mistake, 419, note. The bill shows, too, a want of diligence which is fatal to relief in equity.—*Bowden v. Perdue*, 59 Ala. 409. The judgment of the justice was for the entire property, and not merely for the portions thereof alleged to have been omitted by mistake from the lease; and when the lease is reformed, no facts are alleged which show that, on another trial, the judgment will be different. The complainant himself can dismiss his appeal, and thereby put an end to the action at law; and he shows no ground whatever for staying the writ of restitution, the issue of which he might have prevented by giving a *superseas* bond.—High on Injunctions, §§ 98, 175, 325; *Womack v. Drew*, 50 Ala. 5; *Hamilton v. Adams*, 15 Ala. 596.

STONE, J.—*Long v. Brown*, 4 Ala. 622, was the case of a bill filed to correct a mistake in the description of part of a tract of land, which Brown had contracted to convey to Long. The answer admitted the mistake, and averred that he, Brown, was never advised of it until the filing of the bill, and that he would have corrected it at any time, if applied to. The court said: "To give a court of equity jurisdiction to enjoin a judgment at law, until a mistake of this kind could be rectified, application should have been made to the vendor to make it, and on his refusal that court would interfere, if necessary, to prevent an injury from that cause." No authority was cited in support of this assertion. In *Beck v. Simmons*, 7 Ala. 71, and in *Lamkin v. Reese*, *Ib.* 170, the same doctrine was asserted, referring to *Long v. Brown* for authority, and to no other adjudication. The same doctrine is asserted in Kerr on Fraud and Mistake, in a note on page 419, but it refers to the cases cited from 7 Ala. alone. We have been cited to no decisions in other States, nor to anything in elementary writers, nor have we been able to find anything, anywhere said, which sustains these views. Many cases arise, and are likely to arise, where corrections of mistakes could not be made, by reason of the incapacity of the parties to make binding contracts or corrections. We submit if it is not a much better rule, in all such cases, to retain the bill until the correction is made; and if the bill was filed without previous request, and unnecessarily, let the costs be taxed against the complainant.

In the later case of *Black v. Stone*, 33 Ala. 327, this court modified, if it did not change, the rule declared in *Long v. Brown*. That was a case of alleged mistake in the draught of a written

[Robbins v. Battle House Company.]

contract. This court said: "When this mistake was discovered by the complainants, they should, in the absence of any excuse for the omission, have called upon the vendors for the correction of the mistake. The bill avers neither a request for the correction of the mistake, nor any reason for its omission." This case is an authority for the doctrine, that facts or circumstances may excuse the failure to first request the correction of the mistake, before filing a bill for the purpose. Certainly, if parties had not legal capacity to make the correction, or disputed the alleged mistake, or refused to correct it, either of those would excuse previous request. The law does not require a vain or fruitless thing, any more than it frowns on a needless plunge into a law-suit.

The Battle House Company, lessor, instituted a suit in unlawful detainer, against Robbins as lessee, seeking to evict the latter from the premises, which were occupied and kept as a hotel. There was a written lease, by the terms of which the occupancy was to commence October 1st, 1880, and to continue five years. The proceedings in unlawful detainer were instituted in April 1884, when about one and a half years of the agreed term were unexpired. The Battle House is a building of five stories. The entire building, except parts of the ground floor, or first story, have been used by the lessee, as the hotel, during the entire term, up to the present time. The complaint in unlawful detainer counts on a written lease for five years, of the second story of the building, and designated parts of the first story, and complains that, as to these, the lease has been forfeited, according to its express provisions, by non-payment of rent. As to the third, fourth and fifth stories of the hotel, the complaint alleges that Robbins was tenant at will, or at sufferance, and that the tenancy had been terminated by notice to quit. The lease, in terms, mentions and lets only the second story, and designated parts of the first. It is silent as to the third, fourth, and fifth stories. It is thus shown that, as to the first and second stories, the right of recovery is based on the forfeiture of the lease, conceding that, when it was entered into, it was valid and binding for the entire term of five years. As to the third, fourth and fifth stories, the claim is, that the tenant was in for no definite term—that he was a mere tenant at will, or sufferance, which was determinable at any time, at the mere will of the landlord. There was a recovery of the entire premises in the trial before the justice of the peace, and an appeal to the Circuit Court, where the cause is still pending, awaiting a trial *de novo*.

The present bill was filed to reform the lease. It alleges that, by the agreed terms, the letting was of the entire building, less certain parts of the first story, not used as part of the

[Robbins v. Battle House Company.]

hotel; and that by mistake the third, fourth and fifth stories of the building were omitted from the writing. It is further alleged, that said omitted stories have been occupied by the lessee as part of the hotel, ever since the letting, and as part of the leased premises, and that no complaint has been made by the lessor on that account. It is further alleged, that the mistake was not discovered by the lessee, until the trial of the unlawful detainer suit before the justice of the peace.

The draughtsman of the lease, who, as president of the Battle House Company, made the contract of letting, died before these suits were instituted.

The answer, while it expresses a belief that the mistake charged was made, nevertheless professes ignorance of the intention of the draughtsman, and neither admits nor denies the mistake. It adds: "Defendant shows that it has never refused to reform said lease, and to make the necessary correction in it, and it shows that no application was ever made to it by complainant to do so; and defendant says, that it would, at any time, if applied to, have corrected any mistake in said lease, and is still ready and willing to do so, if applied to by complainant." This falls very far short of admitting the mistake, and offering to correct it. A readiness and willingness to correct *any mistake* in the lease, none being in terms admitted, is not the equivalent of an admitted mistake, and an offer to correct it.

It is contended for appellee, that inasmuch as the justice of the peace decided the entire claim for the plaintiff—that covered by the written lease, as well as the part omitted—the reformation of the lease is a matter of no importance to the appellant. That would probably be so, if the judgment of the justice of the peace was final. But it is not. There has been an appeal to the Circuit Court, where the case is to be heard *de novo*. The appellant has the right to have the true contract he made passed on and considered by the Circuit Court, when the case comes up for trial in that court. We can not know the Circuit Court will rule as the justice did. We think the present bill shows a sufficient excuse for not calling on the appellee to correct the mistake, before filing his bill; and the answer of defendant does not relieve it of the imputation of fault.

The decretal order of the chancellor, on the question we have been considering, is reversed, and the injunction reinstated, so far only as to enjoin the further prosecution of the suit of unlawful detainer in the Circuit Court, until the further action of the Chancery Court is had, pursuant to this opinion. If the alleged mistake in the draught of the lease was made, and we suppose it was, the Battle House Company should not be per-

[Robbins v. Battle House Company.]

mitted to prosecute their suit of unlawful detainer in the Circuit Court, until the lease is so far reformed as to express its agreed terms.

When the appeal from the justice's judgment was prayed and obtained to the Circuit Court, the appellant had the right to execute a *supersedeas* bond, and thus prevent the issue of a writ of restitution.—Code of 1876, § 3711. Such bond is required to be in the penalty of double the annual rental value of the premises. The penalty of such *supersedeas* bond, in this case, would probably have been twenty thousand dollars. If the Circuit Court should affirm the justice's judgment, then the plaintiff could, on motion, recover judgment in the Circuit Court "against the appellant and his sureties on the bond, for the value of the rent of the premises pending the appeal, and also the costs." This is a very valuable statutory right, secured to plaintiffs who are successful in the primary court, and is in keeping with the summary nature of the remedy it is intended to aid. It secures to successful plaintiffs, in such appeal cases, full indemnity and redress, without the delay and expense of a new and independent suit.—Code, § 3713. The appellant below, complainant in this suit, had the statutory right to give this bond, thus preventing the issue of a writ of restitution. He did not avail himself of it, but seeks to accomplish the same result by an injunction. Suspension of such writ of restitution, unlike the reformation of the lease, is, in no sense, a necessary condition to a fair trial of the unlawful detainer in the Circuit Court. If it were, then the proper *supersedeas* bond should have been given in the first instance. The chancery powers invoked to reform the lease, do not vary this question. The equity, the only equity of the present bill, is the claim it asserts to have the lease reformed. Injunction of the unlawful detainer suit in the Circuit Court, is necessary to give that relief its proper effect. This necessity extends no farther, for the equity of the bill extends no farther. It was complainant's fault, or misfortune, that he did not, when he appealed, give a *supersedeas* bond. The present bill shows no right to enjoin the writ of restitution.—1 Pom. Eq. § 171.

In the other phase of the bill—that which prays an injunction of the suit on the notes—there is no equity.

Reversed and remanded, to be proceeded in according to the principles hereinabove declared.

[Bolman v. Lohman.]

Bolman v. Lohman.*Bill in Equity for Foreclosure of Mortgages.*

1. *Amendment of bill ; husband and wife as parties.*—When the original bill alleges that the complainant is a widow, and seeks to foreclose a mortgage taken by her in her own name, an amendment may be allowed (Code, § 3156), alleging that she is in fact a married woman, but living separate and apart from her husband, and that he had never sought to exercise any control over her money or property; and on these allegations, the husband is properly joined with the wife as a complainant in the amended bill.

2. *Multifariousness, and misjoinder.*—A bill is not multifarious because it seeks to foreclose two mortgages on the same property, one of which was given to the complainant for money borrowed to pay off the other, under circumstances which would entitle him to be subrogated to the security of the prior mortgage; and the second mortgage being given by a widow who had only a life-estate in the property, while the first was executed by her and her husband while living, her children being remainder-men under the husband's will, she and her children are properly joined as defendants to the bill, although their interests are separate and distinct.

3. *Subrogation of creditor to mortgage security.*—The lender of money which is used in paying off a mortgage, or other incumbrance on land, is not entitled, on that account alone, to be subrogated to the rights of the mortgagee; but, if the money was advanced for the purpose of paying off the mortgage, with the just expectation of obtaining a valid security on the property for the re-payment, and it was used in paying off the mortgage; or, if the mortgage given for its re-payment is defective, or the money used in paying off the mortgage debt was procured by fraud and misrepresentation—in these cases, the lender is entitled to be subrogated to the security of the mortgage which his money has discharged.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case in which the complainant was described as "Augusta Lohman, widow, seventy years of age, infirm, and without education," was filed on the 24th July, 1883, against Louisa Bolman; and sought the foreclosure of a mortgage on certain real estate in Mobile, or the sale of Mrs. Bolman's interest therein, for the satisfaction of the secured debt, which was recited to be \$2,000 borrowed money. The mortgage, a copy of which made an exhibit to the bill, was dated December 1st, 1881, and described the mortgagee as Augusta Lohman. The bill alleged that Mrs. Bolman, at the time she applied to the complainant for the loan of this money, "stated that said property belonged to her, that she had a good title thereto, and that it was worth two or three times the money

[Bolman v. Lohman.]

she asked to borrow;" and it was further alleged that, a few days after the execution of the mortgage, complainant discovered that Mrs. Bolman had only a life-estate in the property under the will of her deceased husband, which had not then been admitted to probate.

The defendant filed an answer to the bill, in which was incorporated a demurrer; and she pleaded that the complainant was in fact a married woman, having a husband living, whose name was Peter Craft, and who was a necessary party to the bill. Afterwards, on motion made before the register, and allowed by him, the complainant amended her bill, by adding these averments: 1. That she was married to Peter Craft more than twelve years before the filing of her original bill, but lived with him only a few months; that he never exercised any dominion or control over her property, or had possession of any part of it; and that she was always known and called by the name of Augusta Lohman, as stated in the mortgage. 2. That the money loaned to Mrs. Bolman was a part of the complainant's statutory estate under the laws of Alabama. 3. That Mrs. Bolman, "while negotiating said loan, told complainant that she wanted the money to pay off a former mortgage on her said house and lot, held by her sister in law, Mrs. Dorothy Frank, and, when she got the money, did use the same for that purpose, and thereby discharged said prior mortgage, which was made by said Louisa Bolman and her husband, John Bolman, who then held a fee-simple title to said property." The amended bill also made Peter Craft a co-complainant with Mrs. Lohman, and prayed that the children of said John and Louisa Bolman, as remainder-men under his will, might be made defendants to the bill; and the prayer was added, "that complainant Augusta be subrogated to the lien and right of said Dorothy Frank which she held under said mortgage on said property made by said John Bolman and his wife, and that the legal and equitable title thereof be condemned to pay complainant's said debt."

A demurrer to the bill as amended was interposed by Mrs. Bolman, because of multifariousness, and because the amendment was an entire departure from the original bill, and on several other grounds specifically assigned. The chancellor overruled the demurrer, and also overruled a motion to dismiss for want of equity; and his decree is now assigned as error.

F. G. BROMBERG, for appellant.—(1.) The amendment was an entire departure from the original bill, and, on that account, the demurrer ought to have been sustained.—*King v. Avery*, 37 Ala. 169. The original bill was that of Augusta Lohman as a *femme sole*, and the amended bill was that of her husband.

[Bolman v. Lohman.]

Michan v. Wyatt, 21 Ala. 826; *Hamilton v. Clements*, 17 Ala. 205; 1 Dan. Ch. Pr. 108, 109, n. 7. (2.) The amendment made the bill demurrable for both multifariousness and misjoinder. Mrs. Bolman's children, as remainder-men under their father's will, had no interest in the mortgage which she had given on her individual interest in the property; and they were improperly joined as defendants.—*Felder v. Davis*, 17 Ala. 422; *Johnson v. Parkinson*, 62 Ala. 456; 1 Dan. Ch. Pr. 335, 4th Amer. ed.; Story's Eq. Pl. (8th ed.) § 530. In asking a foreclosure of one mortgage and subrogation to the security of another, inconsistent matters are united, and the charge of multifariousness is incurred.—*Lehman v. Meyer*, 67 Ala. 396; Story's Eq. Pl. (8th ed.) § 42 b; *Rapier v. Gulf City Paper Co.*, 69 Ala. 480; *Jones v. Reese*, 65 Ala. 134; *Ray v. Womble*, 56 Ala. 36; *Moore v. Alvis*, 54 Ala. 356; *Winter v. Quarles*, 43 Ala. 693. (3.) The bill does not make out a case for subrogation.—*Sanford v. McLean*, 3 Paige, 117; *Banta v. Garmo*, 1 Sandf. Ch. 383; *Wilkes v. Harper*, 1 N. Y. 586; *Cole v. Malcolm*, 66 N. Y. 366; *Shinn v. Budd*, 14 N. J. Eq. 234; *Midland Railroad Co. v. Wortendyke*, 27 *Ib.* 660; *Coe v. Railway Co.*, 3 *Ib.* 105; Sheldon on Subrogation, §§ 3, 240, 248; 63 N. Y. 314; 15 Iowa, 37.

OVERALL & BESTOR, and L. H. FAITH, *contra*.—(1.) The defendant first pleaded the non-joinder of the complainant's husband, and then demurred because he was made a party. That the husband was properly made a complainant with his wife, see *Pitts v. Powledge*, 56 Ala. 147; *Sawyers v. Baker*, 66 Ala. 292, and 72 Ala. 49. (2.) The averments of the bill, original and amended, entitle the complainant to be subrogated to the security of the first mortgage, which her money has paid and discharged.—Dixon on Subrogation, 165; *Sloan v. Frothingham*, 72 Ala. 589; *Robertson v. Bradford*, 73 Ala. 116; *Irwin v. Bailey*, 72 Ala. 467; *Bright v. Boyd*, 1 Story, 498; 8 Dana, 183; 5 Texas, 315; Sheldon Subrogation, 38, and cases cited.

SOMERVILLE, J.—The bill is one filed by the complainant, Mrs. Augusta Lohman, primarily to foreclose a mortgage on certain real estate, executed to secure money alleged to have been loaned by her to one of the defendants, Mrs. Louisa Bolman. The averment of the bill, as originally filed, was that the complainant was a widow. An amendment to the bill was allowed by the chancellor, showing that the complainant was a married woman, living apart from her husband; that the money loaned was her statutory separate estate, over which her husband had never sought to exercise any control or dominion; and that she had never assumed the name of the husband, but

[Bolman v. Lohman.]

was then and had long been known by the name of Lohman. The husband, one Peter Craft, was made a co-complainant to the bill, however, by amendment, on motion, which was allowed against the objection of the defendants.

The allowance of these amendments was, in our opinion, free from objection. The only limit to this right under our statutes, as we have many times said, is, that there must not be an entire change of parties, nor the substitution of an entirely new cause of action.—*Dowling v. Blackman*, 70 Ala. 303; *Long v. Patterson*, 51 Ala. 414; Code, 1876, § 3156. The only change wrought by the first amendment is in the description of the complainant's title, and of the capacity in which she sues. Her original title is that of a *femme sole*; the new title, that of a *femme covert*. The only difference between the two is created by the rights and relationship of the husband as statutory trustee of the wife. The case made by the amended bill can, in no proper sense, be said to be such a radical departure from that made by the original bill, as to constitute an entirely new case. Each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each.—*Pitts v. Powledge*, 56 Ala. 147; *King v. Avery*, 37 Ala. 169; *Adams v. Sayre*, 70 Ala. 318.

The husband was a proper party plaintiff, and there was no error in permitting his joinder with the wife in a court of equity. The case is not distinguishable from *Sawyers v. Baker*, 72 Ala. 49.

The bill is not objectionable on the ground of multifariousness. Its purpose is single—the enforcement of a mortgage lien on property claimed by the defendants, executed to secure the payment of money alleged to have been borrowed from the mortgagee. It is true that there are two securities, the benefit of which is claimed in favor of the complainants. The first is a mortgage executed by Mrs. Bolman, upon her interest in the property, which was only a life-estate, created by the will of her deceased husband. The second was a mortgage executed by Mrs. Bolman and her husband, prior to his death, to secure a debt due to a Mrs. Frank, to the benefit of which complainants claim to be entitled by subrogation, upon the ground that it was paid and satisfied by their money borrowed for the purpose of paying it, under such circumstances as to create this equity in their favor. There is no repugnancy whatever between the two securities, or the liens claimed under or through them. The one is claimed additional to, and cumulative of the other. It is a recognized rule, that the objection for multifariousness does not hold, “where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights.”—*Dimmock v. Bisby*, 20 Pick. 377; *Lar-*

[Bolman v. Lohman.]

kings v. Biddle, 21 Ala. 252. In *Randle v. Boyd*, 73 Ala. 282, we said: "Where the object of the suit is single, it is no objection that the different defendants have separate interests in distinct and independent questions, provided they are all connected with and arise out of the single object of the suit." *Kingsbury v. Flowers*, 65 Ala. 479. The reason of the rule is, that courts of equity are averse to a multiplicity of suits, and always strive to prevent unnecessary litigation, as far as possible, without, at the same time, vexing parties with the litigation of questions with which they have no concern.—*Fellows v. Fellows*, 15 Amer. Dec. 428–429, note; *Randle v. Boyd*, *supra*.

All the defendants claimed an interest in the mortgaged property—Mrs. Bolman a life-estate, and her children the remainder—and these interests would be affected by the enforcement of complainants' mortgage liens. There was, therefore, no improper joinder of parties defendant, under the principles above announced.

To entitle the complainants to be subrogated to the lien of the mortgage executed to Mrs. Frank by Bolman and wife, it manifestly required more than the mere appropriation of the borrowed money to the payment of the mortgage. The lender of money which is applied by the borrower in payment of a mortgage, or other lien on land, is not generally subrogated to the lien which is thus extinguished, merely upon the strength of the fact that his funds have discharged the incumbrance. *Sheldon on Subrog.* § 243; *Griffin v. Proctor*, 14 Bush (Ky.), 571; *Chapman v. Abrahams*, 61 Ala. 108. This is analogous to the rule, that a resulting trust never accrues in favor of one who lends money to another for the purchase of land. The very fact of a loan rebuts and contradicts the implication of a trust, which might otherwise be presumptively raised by law.

Whaley v. Whaley, 71 Ala. 159. Subrogation is said to be the creature of equity, and not of contract, and is based on principles of justice and fair dealing. "It is nothing more than the putting by transfer one person in the place of another, and investing the former, in promotion of fair dealing, with the equitable rights of the latter."—*Mc Williams v. Jenkins*, 72 Ala. 480, 487. There is clearly no scope for the operation of the principle in a case of ordinary borrowing, where there is no fraud or misrepresentation, and the borrower creates in favor of the lender a new and valid security, although the funds are used in order to discharge a prior incumbrance. But the rule is settled that, where money is expressly advanced in order to extinguish a prior incumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security; or where its payment is secured by a mortgage, which

[Bolman v. Lohman.]

for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior incumbrancer, whose claim he has satisfied, there being no intervening equity to prevent.—*Kitchell v. Mudgett*, 37 Mich. 82; Sheldon on Subrog. §§ 8, 20; Dixon on Subrog. 165. So, where there is misrepresentation and fraud, by which one has been induced to advance money to discharge a lien on property, and the money is so appropriated, it is common for equity to protect the lender, by subrogating him to the lien which his money has been used to extinguish. Less than this would be to encourage fraud by placing a premium upon artifice and dishonesty.—*Wolfe v. Walter*, 56 Mo. 292; Sheldon on Sub. § 247. In *Mc Williams v. Jenkins*, 72 Ala. 480, where the funds of one party were appropriated, without his consent, to discharge a lien on land, he was held entitled to subrogation, by being declared the equitable assignee of the lien for reimbursement. The discharge of the lien was held to be a purchase for his benefit, rather than an extinguishment.—*Irvin v. Bailey*, 72 Ala. 467.

The bill, in the present case, alleges that the money of complainants was borrowed for the purpose of discharging the mortgage of Mrs. Frank, and was used for this end. It also alleges, that this loan was procured by false representations on the part of Mrs. Bolman, as to the interest which she had in the property. This she represented to be a fee-simple, whereas it was, in truth and fact, only a life-estate. Under the principle above announced, the complainants, in our opinion, should be subrogated to the lien of the mortgage which has been satisfied with their money, borrowed as it was through the device of misrepresentation.

There are some other grounds of demurrer to the bill, which are obviously without merit, and require no discussion. The demurrer was properly overruled by the chancellor, in all its parts—both to the original and the amended bill.

The assignments of error raise no question as to the rulings of the chancellor on the demurrer to the cross-bill. We do not, therefore, discuss this portion of his decree.

There is no error in the record, and the decree is affirmed.

[Kelly v. Turner; Masson v. Turner.]

Kelly v. Turner; Masson v. Turner.

Bills in Equity by Creditors, to subject Equitable Estate of Married Woman; Cross-Bill for Reformation of Deed.

1. *Reformation of deed, on ground of mistake.*—An erroneous opinion as the legal effect and operation of a conveyance, developed by events subsequent to its execution, is a mistake of law, and furnishes no ground for a reformation of the deed.

2. *Judicial decisions overruling former decisions; effect on titles and contracts.*—When titles have been acquired, judgments rendered, contracts performed, or transactions completed, based on judicial decisions which are afterwards overruled or reversed, titles and rights thereby acquired are not annulled or affected by such change in the judicial decisions; but this principle can not be so applied as to require that legal effect and operation shall be given to a conveyance according to the judicial decisions of this court which were of force when it was executed, which decisions were in conflict with repeated former adjudications, and have since been expressly overruled by later cases declaring and re-establishing the former decisions.

3. *Equitable estate of married woman; priority of liens among creditors.* In charging the equitable estate of a married woman with her contracts and engagements, a court of equity does not proceed on the theory that they are valid and operative as appointments or appropriations by her of so much of her estate as may be necessary to satisfy them, but on the principle of her presumed intention to do a valid act, and therefore to charge the estate which she has full capacity to charge; but her contracts do not create a lien or charge on any specific property, such as is created by the filing of a bill in equity; and when bills are filed by several creditors, seeking to charge and condemn the same property, the priority of their liens is determined by the time when their respective bills were filed, and not by the time when their debts were created.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

In these several cases, which were heard together in the court below, and were argued and submitted as one case in this court, bills in equity were filed by several creditors of Mrs. Emma C. Kelly, a married woman, against her and her husband, Washington C. Kelly, seeking to subject to the payment of the complainants' several debts Mrs. Kelly's interest in certain real estate in the city of Mobile, which was alleged to be held by her as an equitable estate. Mrs. Kelly was a daughter of Hope H. Slatter, deceased, and inherited from him an undivided one-fourth interest in the said real estate; and she obtained another undivided one-fourth interest from each of her brothers, S. F. Slatter and H. H. Slatter, under conveyances executed to her by them. The conveyance from H. H. Slatter was

[Kelly v. Turner; Masson v. Turner.]

dated November 6th, 1869, and duly acknowledged and recorded on the same day; purported to be executed "in consideration of the love and affection" of the grantor for his said sister, "as well as in consideration of the sum of \$9,000 paid to me [him] by the said Emma;" and conveyed to Mrs. Kelly the grantor's undivided one-fourth interest in the property, "to have and to hold the said property, together with the appurtenances, unto her, the said Emma C. Kelly, as her separate property and estate, free from the debts and liabilities of her husband, and to her heirs and assigns forever." The conveyance from S. F. Slatter was dated August 3d, 1871, and was duly acknowledged and filed for record on that day; used the same words of conveyance, and recited as its consideration the present payment of \$16,000; but of this amount only \$8,000 was paid in cash, and for the residue two promissory notes were given by Mrs. Kelly and her husband, each for \$4,000, payable one and two years after date, and secured by mortgage on the land conveyed.

The first bill, in the order of time, was filed on the 3d January, 1877, by Mrs. Anna G. Turner and her husband. Mrs. Turner was the niece of Mrs. Kelly, and her debt was contracted for a loan of money belonging to her statutory estate, for which Mrs. Kelly and her husband executed their promissory note for \$5,000, dated March 27th, 1873; which note was renewed on the 27th March, 1874, and again on the 27th March, 1875, the interest having been paid annually. The second bill was filed on the 28th February, 1877, by James H. Masson, who claimed to be the owner of one of the notes for \$4,000 above mentioned, and to have purchased it for valuable consideration, before maturity, in the regular course of trade; and having obtained a decree foreclosing the mortgage given to secure the payment of said notes, the unpaid balance of the decree in his favor, after applying the proceeds realized by the sale under the decree, was the debt to which he sought to subject Mrs. Kelly's remaining interest in the land.

Mrs. Kelly filed an answer to each of these bills, admitting the execution of the several conveyances as alleged; but she denied that either of the conveyances created, or was intended to create, or could create in her, an equitable estate, so far as the money paid was, in each case, a part of her statutory estate, which could not be converted into an equitable estate. She alleged that, at the time of the execution of the conveyance to her by H. H. Slatter, she held a mortgage on S. F. Slatter's interest in the property, to the amount of about \$4,500, and had other moneys due to her in New Orleans, which also belonged to her statutory estate; that said H. H. Slatter then proposed to her, if she would release said mortgage, and pay him \$4,500

[*Kelly v. Turner*; *Masson v. Turner*.]

besides, out of her moneys and the claims due her in New Orleans, that he would convey to her his one-fourth interest in the property; that she accepted this offer, which was very liberal on his part, and left her husband and said H. H. Slatter to have the deeds prepared; and that she never read over the deed executed to her by her said brother, either before or after it was delivered to her. She alleged, also, that the money borrowed by her from Mrs. Turner was, as Mrs. Turner well knew at the time, borrowed for the use and benefit of said W. C. Kelly, and was used and wasted by him; that Mrs. Turner was well acquainted with the condition of her property, and knew that it was all inherited from her father, or bought with moneys so inherited, and could not be subjected to the payment of her husband's debts, or of her own contracts not specially authorized by law; that Masson was not an innocent purchaser of the note held by him, but bought it at a discount, and knew the consideration on which it was founded; and she insisted that said note was not a charge on her interest in the land acquired under the conveyance from H. H. Slatter.

On 12th February, 1877, after the filing of Mrs. Turner's bill, H. H. Slatter executed a deed to Mrs. Kelly, on her application, which, after referring to his former deed as having been made in consideration of \$9,000 to him in hand paid by Mrs. Kelly, contains the following recitals: "And whereas the money paid for said purchase of said interest was the separate statutory estate of the said Emma, derived to her by inheritance from her father and her uncle, which fact was well known to me at the time; and whereas it has been made known to me that it is doubtful whether said conveyance made by me to said Emma C. conveys to her a statutory separate estate, the same as the money paid to me and invested in the purchase of said property; and whereas it was not contemplated, at the time, to make any change in the tenure of her estate and property, but the same was an investment for her of her statutory separate estate; and whereas the said Emma has called on me to reform said conveyance," &c.; and it then conveys the property to Mrs. Kelly, "to have and to hold as her statutory separate estate under the laws of Alabama." On the 9th November, 1877, having filed her answers as above stated, Mrs. Kelly filed her original bill against her husband, said J. H. Masson, and Mrs. Turner, setting up this second conveyance from H. H. Slatter, and praying that it might be enforced and established as against the demands asserted by said complainants in their respective bills; setting forth the consideration of the conveyance executed to her by her brothers, as stated in her answers; alleging that there was no intention, on the part of either of said grantors or herself, to change the nature or character of

[Kelly v. Turner ; Masson v. Turner.]

her estate; and praying that the conveyances might be reformed, if necessary (which she denied), and her statutory estate in the property be declared and established against the complainants' several demands.

The three causes being submitted together, the chancellor (Hon. H. AUSTILL) overruled the demurrers interposed by Masson and Mrs. Turner to the bill filed by Mrs. Kelly, and rendered a decree in her favor; declaring that her statutory estate could not be converted into an equitable estate, and could not be subjected to the satisfaction of the demands asserted by Mrs. Turner and Masson, whose bills he therefore dismissed. On appeal to this court, by Mrs. Turner and Masson, the chancellor's decree was reversed, and the cause remanded; this court holding that a statutory estate might, with the consent and concurrence of the husband, be converted into an equitable estate in the wife; that this was the effect of the conveyance first executed to Mrs. Kelly by H. H. Slatter; that the interest thereby vested in her was subject to the demands asserted by Mrs. Turner and Masson, and that Mrs. Kelly was not entitled to a reformation of the conveyance. STONE, J., dissented from the opinion of the court, on the first point.—See the report of the case in 70 Ala. 85–100.

While proceedings were pending in these causes, as above stated, bills were filed by other creditors of Mrs. Kelly, seeking to charge their respective debts on the property described in the pleadings. One of these was said H. H. Slatter, who held one of the notes for \$4,000 above described, and who had obtained, like Masson, a decree in the suit for the foreclosure of the mortgage, and claimed an unpaid balance still due him; another was George Metzger, and a third was Jane Floyd. A reference of the matters of account was ordered under each of these bills, and an account was stated by the register showing the amount due on each debt. The causes being all submitted together, and consolidated, the chancellor rendered a final decree in conformity with the opinion of this court, and ordered a sale of the property for the satisfaction of the complainants' several debts; declaring that Mrs. Turner, whose bill was first filed, was entitled to be paid first, Masson next, and the others in the order in which their bills were filed.

From this decree Masson appeals, and here assigns as error the priority declared in favor of Mrs. Turner. The other creditors join in this assignment of error, and further insist that all the creditors were entitled to be paid equally. Mrs. Kelly also appeals, and assigns as error the dismissal of her bill, and the decree granting relief under the creditors' bills.

JAS. BOND, for Mrs. Kelly.—Admitting the correctness, on
VOL. LXXIV.

[Kelly v. Turner; Masson v. Turner.]

grounds of public policy, of the conclusion attained by the court on the former appeal, as to the power of the parties themselves to change the statutory estate of the wife into an equitable estate; it is earnestly insisted that, in this case, there was no intention to make such conversion; and that if the terms of the deed effect such a change in the character of the estate, it was contrary to the intention of the parties, and the result of a mistake which ought to be corrected. The testimony of H. H. Slatter, the grantor, is clear and emphatic, and is entirely uncontradicted and unimpeached. He gave no thought to the rents or income, which the husband was entitled to receive if the estate was statutory, but desired to invest the principal sum in such manner that it would be safe—in lands, which could neither be mortgaged nor otherwise charged with debts. And this was the legal effect of the conveyance as written, under the latest decisions of this court construing the statute.—*Molton v. Martin*, 43 Ala. 461; *Sprague v. Tyson*, 44 Ala. 338; *Glenn v. Glenn*, 47 Ala. 204; *Denechaud v. Berry*, 48 Ala. 591. These decisions of the court of last resort, while they were of force, were the law of the land, and business transactions were necessarily conducted on the faith of them. Of course, courts sometimes fall into errors, and it is proper that erroneous decisions should be overruled, as these have been; but care will be taken that a retrospective operation be not given to the later decisions, which will cause injury to innocent parties, who relied and acted on those erroneous decisions.—*Lyon v. Richmond*, 2 John. Ch. 59; *Haridgree v. Mitchum*, 51 Ala. 154. These creditors can not be injured by a reformation of this deed as asked by Mrs Kelly. They were well acquainted with the nature and character of her estate; they did not give her credit on the faith of any equitable estate, but relied on her ability to pay them out of the ample income which she then enjoyed; and the circumstances all repel the idea of an intention, actual or presumed, to charge an estate which they did not then know she had in this property.

HAMILTONS, and MACARTNEY & CLARKE, for Masson; G. Y. OVERALL, and L. H. FAITH, for Mrs. Turner; F. G. BROMBERG, and J. L. & G. L. SMITH, for other creditors. (No brief on file.)

BRICKELL, C. J.—Notwithstanding the able argument of the counsel for Mrs. Kelly, we are constrained to adhere to the conclusion expressed when this cause was before the court at a former term. The pleadings and the evidence do not authorize a reformation of the conveyance under which she holds the premises sought to be charged with debts contracted by her, as it must be presumed, on the faith and credit of her equitable

[Kelly v. Turner; Masson v. Turner.]

separate estate.—*Turner v. Kelly*, 70 Ala. 85. There can be, in view of the evidence, no denial that the conveyance is precisely such as was designed by the parties; nor can it be contended that there was an agreement it should be of a different nature and character. There is no term introduced, which they did not intend, at the time of its execution, should be introduced; nor is there the omission of any term it was intended to introduce, nor, in any respect, any inapt expression of their purposes or agreement. All that can be said is, that in view of subsequent events, if the legal incidents of the estate created had been fully apprehended, a species of conveyance would have been adopted relieving the estate from the liability now attaching to it. If it were more certain that the parties did not apprehend the legal incidents of the estate, a court of equity could not intervene for the reformation of the conveyance: the mistake would be of law, and not of fact. When a written instrument is, in its terms, clear and unambiguous, as is this conveyance, in the absence of fraud, or of mistake of fact, a court of equity can not take jurisdiction to reform it, because the parties, or either of them, may not have apprehended its legal effect. As was said by GOLDTHWAITE, J., in *Larkins v. Biddle*, 21 Ala. 256, "there is, in such a case, nothing for a court of equity to lay hold of. The parties have made their own contract, and a court of equity can not change it."

2. It is true that there was a line of decisions, of then recent origin, prevailing when this conveyance was executed, and the contracts sought to be enforced were entered into, which would have led to the conclusion, that though the conveyance, by appropriate words, and the words for that purpose generally employed, created an equitable separate estate, that was not its character in contemplation of law; that it was a statutory separate estate, and the capacity of Mrs. Kelly to contract, or to bind it, was not dependent upon the terms of the conveyance, but upon the statute defining and regulating the separate estates of married women. These decisions were not only in direct antagonism to a series of former decisions which had been acted upon by the profession, and accepted by the community as a correct and conclusive exposition of the law, touching a question of vital importance, but they were anomalous. In all the States in which the common law in reference to the property of married women has been abrogated, either by constitutional or by statutory provisions, and the wife clothed with capacity to hold property owned by her at the time of marriage, or which after marriage she becomes entitled to, so far as we have discovered, the constitutional or statutory provision has not been construed as subverting, or as affecting equitable separate

[Kelly v. Turner; Masson v. Turner.]

estates,—the creation of the donors of property, and not the creation of the law. They arise from the terms of a gift, or a devise, deed, or other instrument, into which the donor may introduce such uses, trusts, or limitations, as are deemed by him most expedient to effectuate his purposes.—Wells' Separate Property of Married Women, § 71. The estate created by the statute is strictly a *legal estate*, for the recovery of which the wife must sue at law, and in her own name, unless, in the particular case, there be some circumstances rendering legal remedies inadequate, or peculiarly of equitable cognizance. It has the incidents, qualities and properties, and no other, attached to it by the law of its creation. Therefore, the original decisions of this court, remaining of unquestioned authority until the line of decisions to which we have referred was made, had affirmed that the statute had reference only to the estates of its creation, estates made separate by operation of law, and did not refer to, or operate upon estates the donors of property created, in the contemplation of a court of equity deemed separate, and which would have been so taken and esteemed if the statute had not been enacted.—*Gerald v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, *Ib.* 532; *Willis v. Cadenhead*, 28 Ala. 472; *Hardy v. Boaz*, 29 Ala. 168; *Pickens v. Oliver*, *Ib.* 528; *Smith v. Smith*, 30 Ala. 642; *Cannon v. Turner*, 32 Ala. 483; *Huckabee v. Andrews*, 34 Ala. 646. The doctrine and the authority of these cases have been fully restored, and the line of decisions to which reference has been made deliberately overruled.—*Short v. Battle*, 52 Ala. 456; *McMillan v. Peacock*, 57 Ala. 127; *Hooks v. Brown*, 62 Ala. 258; *Grimball v. Patton*, 70 Ala. 627; *Turner v. Kelly*, *Ib.* 85.

The correctness of the later decisions, and of the former decisions which they follow, is not questioned; but it is insisted, as the doctrine announced by them was not prevailing when the conveyance was executed and the contracts were made, the validity of each ought not to be determined by them, but by the decisions then regarded as authoritative, which, it must be presumed, were in the contemplation of the parties. This proposition is wholly irreconcilable with the theory, that by mistake of fact any term or limitation was introduced into the conveyance the parties did not intend introducing. It assumes that the conveyance conforms to the intention of the parties, and was purposely made in view of judicial decisions supposed to support it, as creating a statutory, and not an equitable estate. If the fact were apparent—if it were not mere matter of presumption—that the conveyance and contracts were made in view of these decisions, all that can be said is, the parties were under a mistake as to the law. They knew the decisions were conflicting; they exercised their own judg-

[Kelly v. Turner; Masson v. Turner.]

ment as to the effect and consequences of the conflict; and if they have been mistaken, the mistake is of law. Agreements made and acts done under a mistake of law, in the absence of fraud, misrepresentation, or an abuse of confidence, superinducing the mistake, are generally held valid and obligatory. The rules and principles of law are regarded as certain, though they may not have been the subject of immediate adjudication, or though there may be in reference to them conflicting adjudications. In *Lyon v. Richmond*, 2 John. Ch. 60, Ch. Kent said: "The courts do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision, in any one given case, on a point of law, to open and annul every thing that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences." The same principle was announced in *Hardigree v. Mitchum*, 51 Ala. 151, in which relief from acts done and acts induced was claimed, because into them the party had been led by the theory of a judicial decision which was subsequently overruled. When titles have been acquired, or judgments rendered, or contracts performed, or transactions completed, a subsequent judicial decision, reversing or overruling decisions upon which they may have been founded, can not be invoked to undo or annul them.—*Jacobs v. Moragne*, 47 N. Y. 81; *Kenyon v. Welby*, 20 Cal. 637; *Baker v. Pool*, 56 Ala. 14. The doctrine now contended for, in its practical application, reaches far beyond this conservative principle. Executory contracts of defined legal operation, and of recognized validity, must be pronounced incapable of enforcement, because made while there were erroneous decisions denying them validity, and while there were other decisions affirming their validity. If the doctrine were established, judicial decisions would operate like statutes, as an enactment of the law as it shall exist in the future,—not as a declaration of the law as it exists presently; judicial errors would be perpetuated, and justice disappointed. The just presumption is, the contracts having been fairly made, that the parties regarded them as valid, and intended their performance. The reversal of the erroneous decisions, the restoration of the former decisions, which had been acted upon as of unquestioned correctness, simply removes all obstacle to the legal accomplishment of the just purposes of the parties, works no injustice, and imposes no burden not voluntarily assumed.

3. A married woman, having an equitable separate estate,

[Kelly v. Turner; Masson v. Turner.]

not restrained or limited by the instrument from which it is derived, is, in a court of equity, so far deemed a *femme sole* that she may by her contracts charge such estate to the extent she could bind herself personally if unmarried. The form or character of the contract is not material: it may be written or oral, under or without seal; nor is it of importance whether, in the making of the contract, or by its terms, there is, expressly or by implication, a reference to the estate as the source from which satisfaction of the contract is intended. The theory is, that in the making of the contract the parties do not intend a vain, useless thing or ceremony; and as a married woman is incapable of binding herself personally, the just presumption is, that, as she has capacity to bind her equitable separate estate, satisfaction from it was intended.—*Sadler v. Houston*, 4 Port. 208; *Forrest v. Robinson*, *Ib.* 44; s. c., 2 Ala. 215; *Bradford v. Greenway*, 17 Ala. 797; *McCroan v. Pope*, *Ib.* 612; *Collins v. Rudolph*, 19 Ala. 616; *Collins v. Lavenberg*, *Ib.* 682; *Ozley v. Ikelheimer*, 26 Ala. 332; *Caldwell v. Sawyer*, 30 Ala. 382; *Cowles v. Morgan*, 34 Ala. 535; *Gunter v. Williams*, 40 Ala. 561; *Nunn v. Givhan*, 45 Ala. 370; *Brame v. McGee*, 46 Ala. 170; *Short v. Battle*, 52 Ala. 656; *Burrus v. Dawson*, 66 Ala. 476; *Turner v. Kelly*, 70 Ala. 85. Effect is given to her engagements or contracts, not as appointments or appropriations of so much of the separate estate as may be necessary to satisfy them, but upon the principle that, in a court of equity, she has capacity to make them, though not binding upon her personally, and as there is a want of remedy at law, and the separate estate is a trust, in the exercise of its general jurisdiction over the administration of trusts, the court will intervene, and charge them upon the estate.—*Ozley v. Ikelheimer*, *supra*; *Turner v. Kelly*, *supra*.

In some of the authorities to which we have referred it is said, that the contract creates a lien; and in some, that it creates a charge upon the estate. These expressions, however general, are qualified and limited by the facts of the particular case before the court, and must not be severed from the conclusions reached. When properly read and construed, they were intended only to distinguish the contracts of a *femme covert*, from contracts of personal obligation, valid and operative whether there is an estate or specific property on which the court has jurisdiction to charge them. It is mere misconstruction, against which it is scarcely possible for a court to guard, to read them as intended to express the proposition, that the contract, of itself, confers upon the creditor any specific or vested right of property in the separate estate, or an ascertained, defined right to charge it, or that the estate is thereby incumbered to any greater extent than the property of a person

[Kelly v. Turner; Masson v. Turner.]

sui juris is incumbered by his general contracts, to the satisfaction of which it is his moral and legal duty to appropriate the property he presently owns, and his future acquisitions, saving such as the law may exempt. The creditor has the right, through the agency of a court of equity, to charge the separate estate with the satisfaction of the engagement or contract; the right arises by operation of law, without the tacit or express stipulation of the parties. A general creditor of a person *sui juris* has a kindred right, by the pursuit of legal remedies, to charge all the property of the debtor not exempt. The distinction between the two rights is, that the creditor of a married woman is limited and confined to the equitable separate estate she had when the contract was made; the creditor of one *sui juris* can reach all property the debtor owns, without regard to the time of its acquisition.

It is only by the pursuit of legal remedies a general creditor, or a creditor not having a conventional lien, acquires any vested or specific right in and to the property of the debtor. Until such remedies are pursued, to which the law may attach a lien or charge, the debtor has full dominion over his property, the courts can not disturb. In the exercise of the dominion, if there be no fraud, he may convert one species of property into another, or at pleasure he may alienate, and the courts will not interfere to restrain him.—*Wiggins v. Armstrong*, 2 John. Ch. 144; *Moran v. Dawes*, Hopkins Ch. 365; *Adler v. Fenton*, 24 How. 407. This is equally true of a married woman having an equitable separate estate. Ownership of it, dominion over it, is not displaced or lessened because she has entered into contracts which, if not performed, a court of equity will charge upon the estate. She may sell it, or she may by exchange convert it into another species of property, without offending any right of the creditor. If the creditor would restrain her in the exercise of the right, he must pursue with diligence the remedies the law appoints.

The equities of general creditors of a living person are in all respects equal; there is no foundation upon which a distinction between them can be rested. They are entitled to like remedies; the consideration of the debts due to them is not more or less valuable and meritorious; and their rights spring from the consideration,—not from the order of time in which the debts may have been contracted. Therefore, a court of equity, in the administration of equitable assets, will generally distribute them equally and *pari passu* among all the creditors, “without any reference to the priority or dignity of the debt; for courts of equity regard all debts in conscience as equal *jure naturali*, and equally entitled to be paid.”—1 Story’s Equity, § 554. But, though this is the favorite policy of a

[Kelly v. Turner; Masson v. Turner.]

court of equity, yet, when a judicial preference has been established, by the superior legal diligence of any creditor, that preference, in the administration of the assets of a living person, the court always preserves and protects.—*McDermott v. Strong*, 4 John. Ch. 687; *Lucas v. Atwood*, 2 Stew. 378; *Eaton v. Patterson*, 2 Stew. & P. 11; *Evans v. Welch*, 63 Ala. 250. Upon this principle, a judgment creditor, having exhausted legal remedies, resorting to a court of equity to reach and subject equitable assets, or property an execution at law will not reach, acquires a preference the court preserves against the claims of creditors subsequently intervening.—*McDermott v. Strong*, *supra*; *Edmeston v. Lyde*, 1 Paige, 637; *Henriquez v. Hone*, 2 Edw. Ch. 120.

The creditor of a married woman, resorting to a court of equity to charge her equitable separate estate, must, of necessity, in the bill describe the property which it is sought to subject. *Ravishes v. Stoddart*, 32 Ala. 599. It is upon this property only the decree can operate; for the contract is not of personal obligation, and a decree affecting or binding personally the married woman can not be rendered. In this respect, the suit has some of the characteristics of a proceeding *in rem*, though in form and essential elements it is a suit *inter partes*. A *lis pendens* is created by the institution of the suit, operative against all persons coming in subsequently, by purchase or otherwise. It creates a specific lien, if successfully prosecuted to final decree; the decree taking effect, by relation, from the day of the service of summons to answer. The vigilance of the creditor first instituting suit, and prosecuting it with diligence, entitles him to priority, of which other creditors, less vigilant, who have "loitered on the way," have no just reason to complain. The bill of Mrs. Turner having been first filed, and duly prosecuted, entitled her to priority. A specific lien was created by the decree rendered, taking effect, by relation, from the service of process, of which it would not be equitable to deprive her.

We find no error in the decree of the chancellor, and it must be affirmed.

STONE, J., dissenting, on the point raised on former appeal.

[Heyer Brothers v. Bromberg Brothers.]

Heyer Brothers v. Bromberg Brothers.

Bill in Equity by Creditors, to set aside Sale of Goods as Fraudulent, or enforce it as General Assignment.

1. *Filing bill in double aspect.*—A bill in equity by creditors who had consented to an extension of their debts, seeking, in one aspect, to set aside as void a sale and conveyance of his goods by the debtor to a creditor who had agreed, if the others would consent to the extension as proposed, that his debt should be postponed until the others were paid, or, in the alternative, to have the conveyance declared and enforced as a general assignment, enuring to the equal benefit of all the creditors under the statute (Code, § 2126), asks measures of relief which are inconsistent and incompatible, and is demurrable on that account.

2. *Agreement among creditors, as to postponement and extension of debts.*—A proposal by one of the creditors of an embarrassed debtor, to forbear the assertion and collection of his claim until the claims of the other creditors have been satisfied, on the condition and consideration that they would all consent to an extension as asked by the debtor, does not become binding as a contract until accepted by all of the other creditors.

3. *Same; partial acceptance, and waiver.*—If such proposal is accepted by only a portion of the creditors, and acceptance by the others is waived by the creditor making it, the accepting creditors, seeking redress for a subsequent breach of the agreement on his part, must allege such partial acceptance and waiver.

4. *Same; remedy for breach.*—As to the proper remedy for the breach of such an agreement, after acceptance, *quære*. “Probably, an action at law, founded on the agreement as inducement, would be the remedy; or, to avoid multiplicity of suits, possibly a bill in equity would lie.”

5. *Fraudulent sale of goods; general assignment.*—A sale of his entire stock of goods by an embarrassed or insolvent debtor to one of his creditors, in satisfaction of a debt admitted to be valid, is not fraudulent as against other creditors, when there is no secret trust or reservation of a benefit to the debtor; nor can such a conveyance be declared and enforced as a general assignment at the instance of the other creditors.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 31st May, 1879, by Heyer Brothers, a mercantile firm doing business in Boston, who sued “in behalf of themselves and such other creditors standing in the same position as complainants, who desire to make themselves parties complainants to this bill, and assume their proportion of the costs of the litigation;” against Bromberg Brothers, a partnership doing business in the city of Mobile, and against Frederick Bromberg, who was the father of the two persons composing that firm. The material allegations of

[Heyer Brothers v. Bromberg Brothers.]

the bill, and the prayer for relief, are copied in the opinion of the court. The chancellor dismissed the bill, on final hearing on pleadings and proof; and his decree is here assigned as error.

MACARTNEY & CLARKE, and OVERALL & BESTOR, for appellants.—On the facts alleged and admitted, or established by the evidence, a court of equity will hold F. Bromberg liable as a trustee of the property conveyed to him, for the benefit of the complainants and other creditors, whose debts were extended on the faith of the agreement into which they were induced to enter by his representations—2 Story's Equity, § 1195, 12th ed.; *Boyles v. Payson*, 5 Allen, Mass. 473. The creditors who assented to the proposed arrangement represented debts amounting to near \$50,000, while the four who refused to accept it held less than \$1,200, and their debts were paid and satisfied without objection. F. Bromberg and the assenting creditors had signed the agreement; the new notes had been delivered and accepted; the business progressed under the settlement for more than two years, and sixty per cent. of the new notes had been paid as agreed; and before the maturity of the next installment, the repeal of the bankrupt law having left these creditors remediless, the debtors make a collusive sale of their entire stock of goods, in violation of this express agreement, to the creditor who had promised to wait until the others were paid in full, leaving themselves wholly insolvent. A court of equity will not sanction such a transaction, but will grant the appropriate relief under the general prayer.

HAMILTONS, and F. G. BROMBERG, *contra*.—(1.) The bill was wanting in equity, and was properly dismissed for that reason. The allegations of fraud are insufficient.—*Crawford v. Kirksey*, 55 Ala. 282; *Flewellen v. Crane*, 58 Ala. 627; 3 Ala. 318, 377; 56 Ala. 439, 544. Leaving out the allegations of fraud, the *gravamen* of the bill is an alleged breach of contract on the part of F. Bromberg, for which, if true, complainants have an adequate remedy at law.—1 Porter, 273; 24 Ala. 441; 8 Ala. 743; 34 Ala. 643; 54 Ala. 486. (2.) The bill is filed in the alternative, and its two or more aspects are inconsistent and repugnant.—*Micou v. Ashurst*, 55 Ala. 607; *Gordon's Adm'r v. Ross*, 63 Ala. 366; *Lehman v. Meyer*, 67 Ala. 396; *Moog v. Talcott*, 72 Ala. 210; Story's Eq. Pl. § 530; 1 Dan. Ch. Pr. 335; *Field v. Helms*, 70 Ala. 460. An amended bill is merely a continuation of the original bill, and it can not introduce new matter, varying the relief prayed, or the right in which it is claimed.—54 Ala. 35, 358; 48 Ala. 382; 56 Ala. 37; 28 Ala. 613; 65 Ala. 135. In view of these inconsistent

[Heyer Brothers v. Bromberg Brothers.]

and repugnant prayers for special relief, no relief could be granted under the general prayer.—7 Porter, 144; 27 Ala. 336; 29 Ala. 367; 5 Porter, 10. (3.) The written agreement, as proved, expressly provides that it “shall not be binding upon the persons signing the same, until all the creditors of the said Bromberg Brothers, in the schedule hereinbefore named and set forth, shall become parties thereto by signing it.” The evidence shows that several of the creditors refused to sign the agreement, and therefore it never became binding as a contract. *Holmes v. Love & Tucker*, 3 Barn. & Cr. 242; also, 13 Mass. 424.

STONE, J.—The present case comes before us in a triple aspect, raised in part by the pleadings, and partly on the testimony. Its fate, however, depends mainly on the pleadings, which we will first consider.

Heyer Brothers appear to have been wholesale merchants doing business in Boston, Massachusetts. Bromberg Brothers were retail traders, having their place of business in Mobile, Alabama. The bill alleges, that in 1876 Heyer Brothers were creditors of Bromberg Brothers, and that the latter firm became embarrassed, and unable to meet their debts promptly; that they professed ability to pay the principal of all their debts, if they could obtain the forbearance they sought. They also represented that they were largely indebted to F. Bromberg, their father; the amount not stated in the bill. The bill then proceeds to state, “that said Bromberg Brothers stated and represented to complainants that said F. Bromberg would wait and postpone the payment of his debt until the extended debts were paid, if the creditors would grant the extension; and said Bromberg Brothers, in order to verify their statement, produced and exhibited a document signed by said Frederick Bromberg, in which he agreed that, if the other creditors would grant the extension desired, they should have the preference and priority over his claim against the firm of Bromberg Brothers, and that he, Frederick Bromberg, would waive and postpone the payment of his claim and debt, until all the debts which should be extended should be fully paid; and orators show and state, that said Frederick Bromberg, in consideration of such extension to said Bromberg Brothers, did consent and agree to waive and postpone his debt, until the debts of your orators and other creditors should be fully paid. . . . Your orators further show that, relying upon the statements and representations made as aforesaid by said Bromberg Brothers and Frederick Bromberg, and upon the agreement in writing signed by said Frederick Bromberg, they agreed with the said Bromberg Brothers to extend the time of payment of the debt due them.” The bill then avers that Bromberg Brothers thereupon

[Heyer Brothers v. Bromberg Brothers.]

executed to complainants their extension notes, payable semi-annually, in January and July, and that they paid all the notes except the two maturing in January and July, 1879.

The said offer of Frederick Bromberg, and agreement of extension to be signed by creditors, is not attached to the bill; nor are its contents set out, further than is above shown. The bill contains no averment that the other creditors would or did grant the extension desired, although it shows there were other creditors. The bill then avers that, in November, 1878, when Bromberg Brothers were not in default as to the extended debts, having paid all past-due installments, they, said Bromberg Brothers, made a bill of sale to said Frederick Bromberg, of all their merchandise, fixtures and dues, and every thing of any value belonging to them, "for an alleged consideration of twenty-four thousand four hundred and forty-three 26-100 dollars, alleged to have been paid by said Frederick Bromberg; . . . that said F. Bromberg, upon the delivery of said bill of sale to him, immediately took possession of the store, and of all the stock of goods, wares and merchandise contained therein, and has since that time been carrying on the business in his own name; but whether for his own benefit, or for the benefit of said Bromberg Brothers, orators are not informed.

. . . The other member of said firm, Charles L. Bromberg, is still engaged in the same store, in the same manner and, to all appearances, as much a manager and owner thereof, as when he was a member of the firm, and carrying on the business on their own account." The bill then charges that Bromberg Brothers were insolvent, and that F. Bromberg knew it. It then proceeds and charges, "that the consideration alleged to have been paid by said F. Bromberg to said Bromberg Brothers in said bill of sale, was the sum of twenty-four thousand four hundred and forty-three 26-100 dollars; and orators charge that said sum was not paid to said Bromberg Brothers in cash, but that said Bromberg Brothers were credited upon an old alleged debt due from them to said F. Bromberg, and that said F. Bromberg was to pay himself out of said stock of goods, merchandise, bills receivable and accounts, conveyed to him by said bill of sale. And orators charge that, as stated in paragraph 4 of this bill, that said F. Bromberg took possession of all the property of said Bromberg Brothers, and still claims that they owe him a large balance. And orators charge, that said bill of sale was a conveyance made to hinder, delay and defraud your orators, and other creditors, in the collection of their just debts. And orators further charge, that said Bromberg Brothers, by said bill of sale, conveyed all the property of every kind and description, of which they were possessed, to one alleged creditor, the said F. Bromberg, to the utter exclusion of

[Heyer Brothers v. Bromberg Brothers.]

your orators, and all other creditors. And orators charge, that said F. Bromberg and Bromberg Brothers well knew that said Bromberg Brothers were insolvent, at the time said bill of sale was executed and delivered."

There was an amendment to the bill, but it contains nothing to be noted, unless it be a reiteration of the charge that, by the bill of sale, Bromberg Brothers conveyed to F. Bromberg every thing they jointly and severally owned, that had value.

The prayer for relief was, that said sale to F. Bromberg be set aside as void, and the property thereby conveyed be applied to the claim of orators, and to the other creditors of Bromberg Brothers, who had granted them extension under the said agreement of F. Bromberg, and who would come in and make themselves parties, and contribute to the expense of the suit; "or, if your orators should be mistaken in the belief that they and other creditors are entitled to be paid in preference to said F. Bromberg, then that said bill of sale be declared a general assignment for the benefit of all the creditors of said Bromberg Brothers, who may come into this court and prove their debts."

We have now set out substantially all the bill contains, material to be considered on the present appeal.

When this case was before in this court—69 Ala. 22—the demurrers which had been interposed to the original bill were disposed of. Afterwards, other demurrers were interposed to the bill as amended, and also a motion was made to dismiss the bill for want of equity. The chancellor overruled the demurrers, and refused the motion to dismiss, but dismissed the bill on the proofs in the cause.

We have said this case comes before us in a triple aspect: *First*, under the alleged agreement, that all the extending creditors should have prior payment, before F. Bromberg should come in. Under this aspect, the agreement would be set up as valid and binding, and the bill of sale to F. Bromberg would be converted into a conveyance in trust, and he made the trustee, for the benefit of the complainants and other creditors, who had given extension on their claims. Succeeding in this aspect, only the creditors who signed the agreement, and gave the extension, could obtain relief. *Second*, that the bill of sale to F. Bromberg was fraudulent and void, as a conveyance. This would render the bill of sale inoperative, and would grant relief to all creditors who would come in, prove their claims, and contribute to the expense of the litigation. *Third*, to set up the bill of sale to F. Bromberg as valid, and have it declared a general assignment. Succeeding in this aspect, all the creditors of Bromberg Brothers, existing at the time the bill of sale was executed—November, 1878—would have been entitled to

[Heyer Brothers v. Bromberg Brothers.]

share in its provisions. It needs no further statement to show that these alternate measures of relief are substantially variant and incompatible. The demurrer, assigning that ground, filed to the bill as amended, ought to have been sustained.—*Gordon v. Ross*, 63 Ala. 363; *Micou v. Ashurst*, 55 Ala. 607; *Moog v. Talcott*, 72 Ala. 210; *Lehman v. Meyer*, 67 Ala. 396.

But let us consider the bill in its several aspects, separately. First, that feature of the bill which claims a priority for the creditors who granted extension on the faith of the agreement signed by F. Bromberg. Now, the averment of the bill is, that this offer and alleged contract of F. Bromberg, to forbear the assertion of his claim against Bromberg Brothers until the other creditors should be paid, was on the consideration and condition, that "the other creditors would grant the extension desired." There is not an averment in the bill that any of the creditors, except Heyer Brothers, did grant the extension desired. F. Bromberg's proposition, being only an offer on conditions, could not become a contract, until the conditions were accepted and complied with. Partial acceptance was not enough. If the acceptance was nearly complete, and if F. Bromberg waived further compliance, and consented to act on the acceptance as complete, that should have been averred, setting forth the extent to which it had been accepted, and the waiver and acquiescence by F. Bromberg. The present bill fails to show that F. Bromberg made any binding agreement to abstain from the assertion of his claim.

We do not wish to be understood as conceding that the present bill, in this phase of it, could be maintained, if its imperfections, above pointed out, were remedied. Possibly an action at law, founded on the agreement as inducement, would be the remedy. Or, to avoid multiplicity of suits, possibly a bill would lie, if the necessary averments were made. We decide nothing, however, on this possible phase of the case. Sufficient that, in this aspect, the present bill is fatally defective.

The second aspect. The averments of fraud are wholly insufficient. To come up to legal requirements, there should have been an averment that the debt to F. Bromberg was simulated, or that some valuable interest was secured to Bromberg Brothers, describing it, or some other specific allegation of facts, constituting the fraud, should have been charged.—*Crawford v. Kirksey*, 55 Ala. 282; *Lipscomb v. McClellan*, 72 Ala. 151; *Danner v. Brewer*, 69 Ala. 191. The bill in this case does not deny that Bromberg Brothers owed F. Bromberg the debt claimed, and it charges no secret trust, nor benefit secured to Bromberg Brothers.

The third aspect. According to the averments of the bill, the transfer, or bill of sale from Bromberg Brothers to F.

[Doe, ex dem. Stoutz v. Burke.]

Bromberg, was an absolute sale, in payment of a debt, the existence and *bona fides* of which the bill nowhere denies. There is not enough averred to constitute the conveyance a general assignment.—*Crawford v. Kirksey*, *supra*.

So, in either aspect made, or attempted to be made by the bill, it is void of equity, and the motion to dismiss on that ground ought to have prevailed. It may not be out of place to state, the testimony establishes the debt due from Bromberg Brothers to F. Bromberg, as claimed by the latter. It is also shown that some of the creditors did not assent to the proposed terms of extension; but complainants contend F. Bromberg has waived that.

The decree of the chancellor must be affirmed.

Doe, ex dem. Stoutz v. Burke.

Ejectment by Purchaser at Mortgage Sale, against Mortgagors.

1. *Removal of disabilities of coverture, by decree of chancellor; sufficiency of petition.*—To authorize and sustain a decree by the chancellor, in the exercise of his statutory jurisdiction (Code, § 2731), relieving a married woman of the disabilities of coverture as to her statutory or other separate estate, “so far as to invest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *femme sole*,” her petition (or application) must aver that she has a separate estate, statutory or equitable; and the want of such an averment, it being a jurisdictional fact, renders the decree void.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by George Stoutz, against Mrs. Margaret Burke and her husband, Henry Burke, to recover the possession of a certain tract or parcel of land in Mobile, which the plaintiff claimed under purchase at a sale under a power contained in a mortgage executed by the defendants. The mortgage was executed on the 31st May, 1880, and described Mrs. Burke as a “married woman who was declared a free-dealer by the Chancery Court of the first district, Southern Chancery Division of Alabama, on the 29th day of April, 1880, in accordance with the statute in such cases made and provided.” The petition on which the decree was founded, as set out in the transcript offered in evidence on the trial, was in these words: “Your petitioner, Margaret Burke, by her next friend, H. L. Hopper, respectfully shows that she is a married woman, and is the wife of Henry Burke; and that she and her

[Doe, ex dem. Stoutz v. Burke.]

said husband are residents of the county of Mobile, and have so resided as husband and wife for the ten years last past. The said Margaret Burke desires to be relieved of the disabilities of coverture, and, by her next friend aforesaid, now prays that she may be declared a *femme sole*, and that your Honor will make a decree relieving her of the disabilities aforesaid, as to her statutory and other separate estate, so far as to invest her with the right to buy, sell, hold, convey and mortgage her real and personal property, and to sue and be sued as a *femme sole*, according to the statute in such cases made and provided." The chancellor's decree was rendered in vacation, April 29th, 1880, and was in these words: "The petitioner prays to be relieved of the disabilities of coverture. It appears that Henry Burke, the husband of the complainant, has filed his written consent that she be allowed the relief petitioned for. Upon consideration whereof, it is ordered and decreed that Margaret Burke be, and she is hereby, relieved from the disabilities of coverture as to her statutory and other separate estate, so far as to vest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *femme sole*." The defendants "objected," as the bill of exceptions states, "to the record of said proceedings being received in evidence, on the ground that the petition did not show that said Margaret Burke had a separate estate, and that its averments were not sufficient to authorize said court or chancellor to declare said Margaret Burke a free-dealer." The court sustained the objection, and excluded the transcript as evidence; and this ruling, to which the plaintiff duly excepted, is now assigned as error.

OVERALL & BESTOR, for appellant.—The petition and decree, each, follows the language of the statute (Code, § 2731), and must therefore be held sufficient.—*Driggers v. Cassidy*, 71 Ala. 532.

PILLANS, TORREY & HANAW, *contra*, cited *Cohen v. Wollner*, *Hirschberg & Co.*, 72 Ala. 233; *Tyson v. Brown*, 64 Ala. 244.

BRICKELL, C. J.—The sole question presented by the record is not distinguishable from that which was decided in *Cohen v. Wollner*, 72 Ala. 233. The power of the chancellor to relieve married women of the disabilities of coverture, is derived from the statute.—Code of 1876, §§ 2731–32. When the power is properly exercised, the result is a change in the *status* of the married woman, relieving her of the disabilities the general law imposes, and conferring upon her capacity and rights the general law withholds. The statute is enabling,

[Ross v. The State.]

creating a new jurisdiction, conferring a new power upon the chancellor, not upon the Chancery Court.—*Ashford v. Watkins*, 70 Ala. 156. The power can not be properly exercised, unless upon the face of the proceedings it is apparent that it has been called into exercise by the petition or application of a married woman, having an estate, statutory or equitable. If these facts do not affirmatively appear, the proceedings are *coram non judice*.—*Cohen v. Wollner*, *supra*. The one fact is as essential as the other. It is not intended that any and every married woman shall be relieved from the disabilities of coverture; only such as have an estate in reference to which the capacity expressed in the statute may be employed, are within its meaning and purposes; and, of course, single women already possessed of the capacity are not within its purposes. We repeat, then, before the jurisdiction conferred by the statute can be affirmed to exist, it must be made to appear that a petition, or application, or complaint, was actually preferred by a married woman, having a statutory or equitable separate estate. The petition, or application, upon which the proceedings and decree found in the record were based, contains no averment that the petitioner had an estate of any kind, character or description. The prayer of the petition follows the words of the statute, that she be relieved of the disabilities of coverture, “as to her statutory and other separate estate, so far as to invest her with the right to buy,” &c.; but this is indicative only of the character of the relief, or of the decree sought, and can not be interpreted as an averment of the material fact that she had such estate. It could, and would properly, as well have been the form of the prayer, if she was without a present estate of any kind, but in the contemplation or expectation of acquiring it at some future time, by buying, or otherwise exercising the powers with which she was to be invested.

The judgment is affirmed.

Ross v. The State.

Indictment for Arson.

1. *Flight, and proximity to scene of crime, as evidence corroborating accomplice.*—The fact of flight, by a person accused or suspected of crime, has of itself some probative force as a criminating circumstance; and when it appears that the crime was committed at a very unseasonable hour in the middle of the night, proximity to the scene, and opportunity for committing it, are circumstances “tending to connect the accused

[Ross v. The State.]

with its commission" (Code, § 4895), as those words are used in the statute forbidding a conviction of felony on the uncorroborated testimony of an accomplice.

2. *Corroborative evidence; when necessary.*—Corroborative evidence, as necessary to authorize a conviction on the testimony of a single witness, is only required when that witness is an accomplice (Code, § 4895); and when the jury are left in doubt as to whether the witness was in fact an accomplice, while such doubt may be considered by them in weighing his testimony, the case is not within the statute.

3. *Weight and effect of testimony when "unreasonable and improbable."* Whether the testimony of a witness "is unreasonable and improbable," is a question for the jury; and even if the testimony is "unreasonable and improbable," it does not follow, as matter of law, that the jury must disbelieve it.

4. *Costs of return to certiorari.*—A *certiorari* having been granted in this case, to perfect the record by showing the organization of the grand jury and other proceedings, it was ordered by the court, that the clerk be allowed no costs for the return.

FROM the Circuit Court of Pike.

Tried before the Hon. JNO. P. HUBBARD.

The indictment in this case charged, in the first count, that the defendant, George Ross, "willfully set fire or burned a certain cotton-house, the property of Asa Thompson, which, with the property therein contained, was of the value of five hundred dollars;" and in the second count, that he "willfully set fire to or burned a cotton-house, or cotton-pen containing cotton, which said house or pen was the property of Asa Thompson." A trial was had on issue joined on the plea of not guilty, which resulted in the defendant's conviction and sentence to the penitentiary for the term of five years. On the trial, a bill of exceptions was reserved by the defendant, in which the facts are thus stated:

"The State introduced evidence tending to show that, on or about September 26th, 1882, a cotton-house belonging to Asa Thompson, and in which cotton was kept, was burned in said county, between twelve and one o'clock at night; that said house was immediately on the road, and formed a part of said Thompson's inclosure, his fence joining both ends of it; and that the value of said house, with the cotton contained in it, was about \$100. The defendant, with one Flowers, was seen to go up said road about nine o'clock that night. They passed said house going to Spring Hill, a village in said county, and returned between twelve and one o'clock; and they passed by said house going and returning. Defendant had bought, at a store in said village, some shrouding for his step-child, who was dead. The State then introduced said Flowers as a witness, who stated, that as they passed said cotton-house going up, defendant said that the son of the owner of the cotton, who lived about a quarter of a mile from the cotton-house, had a heap of money; and that if they would set fire to the cotton-house, the

[Ross v. The State.]

son would run down there, and they could go to his house and get his money. Witness said nothing, and defendant said nothing more at that time about burning the house. They then proceeded to Spring Hill, where defendant made some purchases; and on their return, when they got near the cotton-house, defendant again stated that Asa Thompson's son had a heap of money, and if they would set the cotton-house on fire the son would run down there, and they could get his money in his absence. Witness said nothing, but went on the opposite side of the road from the cotton-house, while defendant went on the side next to it, and close thereto. Witness heard something strike like a match, and walked towards defendant, and saw him throw a lighted match, through an opening between the planks, into the cotton-house. After he did so, defendant said, 'Let's hurry up,' and they walked on up the road," quickening their pace several times at the defendant's suggestion.

"The State introduced, also, one Thompson as a witness, who testified that he, with two others, went into the field where the defendant was picking cotton, three or four days after said house was burned, and said to him, 'Will you go up to the gin-house with us?'—said gin-house being the one at which defendant was seen on the night of the burning, and situated not far from the house that was burned. Defendant said he would go with them, and, as they went along, witness and defendant talked about picking cotton. They went towards the road leading to Boutwell's gin-house, as it is called, being the same at which defendant was seen the night of the burning; and after going some distance, one of them being on each side of defendant, it became necessary to get over a fence, and defendant got over first; and after doing so, he ran off. Witness pursued him for some distance, and overtook him, when defendant drew his knife from his pocket, and turned to resist. Witness shot him with a pistol, and he again turned and ran;" being again pursued and overtaken, and attempting to resist, he was cut with a knife, and carried to the gin-house. "While going on, witness said, none of the arresting party told defendant the cause of his arrest, or informed him what they were going to do with him, except that they wanted him to go to the gin-house with them. Some of them were officers, but witness alone pursued defendant when he fled. The defendant then moved the court to exclude so much of the above testimony as related to his flight from the three persons who had him in arrest; and he excepted to the overruling of his said motion. The State introduced other evidence, also, tending to show that, on the night of the burning, Asa Thompson had passed said cotton-house between nine and ten o'clock; that Charles Carlisle and Alex. Thompson also passed said cotton-house between

[Ross v. The State.]

twelve and one o'clock that night, and only a short while before it was discovered by said Asa Thompson's daughter to be on fire, and they saw no sign of fire when they passed. There was evidence, also, of the defendant's proximity to the house at or near the time of the fire."

"This being, substantially, all the evidence, the court charged the jury, among other things, as follows: That if they find the witness Flowers to be an accomplice, then it would be necessary for his testimony to be corroborated by other testimony connecting the defendant with the commission of the offense, before they could convict upon his testimony; that the flight of a party accused or suspected of a crime, if unexplained, was a circumstance to which the jury could look against the defendant; and that, in this case, if the jury should find that such were the facts as to the defendant's flight, and that he did flee, and it was not satisfactorily explained, then such flight would be that kind of corroborative testimony which they could consider as connecting the defendant with the commission of the offense; and that the weight to be given to it was for the jury to determine." The court charged the jury, also, "that if there was other evidence, going to show that the defendant was at or near said cotton-house at the time it was set on fire, that would be such kind of corroborating evidence as the law requires should exist, connecting the defendant with the commission of the offense, before a conviction could be had on the uncorroborated testimony of an accomplice; but the weight to be given to such evidence is for the jury to determine."

The defendant excepted to each of these charges, and then requested several charges in writing, of which the court refused the following: 3. "If the conviction of the defendant depends on the witness Flowers, and his testimony connecting the defendant with the commission of the offense is not corroborated by other evidence connecting the defendant with the commission of the crime, and the jury are left in doubt by the evidence whether said Flowers was or was not an accomplice, then they must acquit the defendant." 4. "If the jury believe, from the evidence, that said Flowers was an accomplice of the defendant, then they can not find the defendant guilty, unless there is evidence corroborating said witness, connecting the defendant with the burning of the cotton-house; and evidence showing that the defendant and others were in the vicinity, at or near the time of the burning, and had the opportunity, is not such corroboration as the law requires." 9. "If the conviction of the defendant depends on the testimony of the witness Flowers, without whose evidence there could be no conviction; and further, when the testimony of said Flowers is

[Ross v. The State.]

unreasonable and improbable, then they should 'disregard his testimony, and acquit the defendant.' The defendant excepted to the refusal of each of these charges.

A *certiorari* was awarded, at the instance of the Attorney-General, to complete the record by showing the organization of the grand jury by which the indictment was found, and other proceedings preliminary to the trial.

J. D. GARDNER, for appellant.

H. C. TOMPKINS, Attorney-General, for the State, cited *Murrell v. The State*, 46 Ala. 89; *Bowles v. The State*, 58 Ala. 335; *Lockett v. The State*, 63 Ala. 5; *Smith v. The State*, 59 Ala. 104; *Com. v. Elliott*, 101 Mass. 104; *Reg. v. Birkett*, 8 C. & P. 732.

STONE, J.—In *Bowles v. The State*, 58 Ala. 335, speaking of flight as an instrument of evidence, we said: "We think it permissible to prove the fact of flight, and all the facts connected with it, either to increase or diminish the probative force of the fact itself." This language clearly implies that flight itself, by one suspected or accused of crime, has some probative force, the weight of which is for the jury to determine.—See Whar. Cr. Ev. § 750. Corroborative testimony, to meet the requirements of the statute, must tend to connect the defendant with the commission of the offense (Code of 1876, § 4895); and any legal testimony having this tendency must be admitted.—*Lockett v. The State*, 63 Ala. 5; *Smith v. The State*, 59 Ala. 104; *Lumpkin v. The State*, 68 Ala. 56; *Marler v. State*, *Ib.* 580. So, proximity and opportunity, when, as in this case, the testimony tends to show the crime was committed at a very unseasonable hour, is a circumstance to be weighed by the jury, in determining the guilt or innocence of the accused. The tendency of each of these species of evidence, as far as they had any tendency at all, was to connect the defendant with the commission of the offense. It was for the jury, and not for the trial court, nor for us, to judge of their sufficiency. The demands of the statute are met, when the corroborative testimony tends to connect the accused with the commission of the offense. Its sufficiency is not a question of law.

Tested by these principles, the Circuit Court did not err in receiving testimony of defendant's flight, nor in the general charge given.

Of the charges asked by defendant and refused, charge No. 3 is involved, and would tend to mislead. Nor is it correct in point of law. To require corroboration as an indispensable condition of a conviction on the positive testimony of a witness,

[Johnson v. The State.]

the statute demands that that witness shall have been an accomplice. It is not enough that the jury shall be left in doubt on the subject. They must be reasonably convinced he was such accomplice, before the statutory requirement comes into play. True, doubt whether or not he was an accomplice may be considered by the jury, in weighing the testimony of the witness, but it does not bring the case within the statutory rule, requiring corroboration as an absolute condition of conviction.

Charge No. 4 was rightly refused, on the principles above declared. Charge No. 9 is faulty in two respects. It assumes that the testimony of the witness Flowers, the alleged accomplice, was "unreasonable and improbable." That was a question for the jury, and should have been stated hypothetically; and, even if the testimony of a witness is unreasonable and improbable, it does not follow, *as matter of law*, that it shall be disbelieved. These are mere matters to be weighed by the jury, in making up their verdict.

The clerk of the Circuit Court will be allowed no costs for the return to the *certiorari*.

Affirmed.

Johnson v. The State.

Indictment against Captain of Steamboat, for Gaming.

1. *Suffering gaming on steamboat.*—Under an indictment against the captain of a steamboat, for knowingly suffering a game of cards to be played on his boat while navigating the Mobile River (Code, § 4212), a conviction can not be had on proof that the game was played on the boat while navigating the waters of the Mobile Bay. The statute is confined in terms to the rivers of the State, and the courts can not extend its provisions by construction.

2. *Proof of card-playing.*—A witness may testify that he saw a game played with cards, or participated in the game, without giving a particular description of it; the accuracy of his knowledge being subject to the test of a cross-examination, if desired.

3. *Oath of petit jury.*—A recital in the judgment-entry that the jury "were duly sworn," or "were sworn according to law," without more, is sufficient; but a recital that they "were sworn to well and truly try the issue joined between the State of Alabama and the defendant," without more, is fatally defective and insufficient.

FROM the Circuit Court of Baldwin.

Tried before the Hon. WM. E. CLARKE.

JNO. R. TOMPKINS, for appellant,

[Johnson v. The State.]

H. C. TOMPKINS, Attorney-General, *contra*.

SOMERVILLE, J.—The defendant, as captain or commanding officer of a steamboat, is indicted for knowingly suffering a game of cards to be played on such boat while navigating Mobile river, in violation of section 4212 of the present Code.—Code, 1876, § 4212. The evidence introduced on the trial tended to show that the playing was done while the steamer was in the waters of Mobile Bay, and not in Mobile River, which latter stream, we judicially know, empties itself into the bay. The court charged the jury, that a conviction could be had, although they believed that the offense charged in the indictment was committed on the waters of the bay, and not on the river. In this, we think, there was error. The statute has reference, in express terms, only to the commanding officers of steamboats “navigating any of the rivers of this State.”—Code, § 4212. There is a well recognized distinction between a river and a bay, the one being an inland stream, and the other an inlet of the sea. Where the one begins, and the other ends, may often be a question of difficulty; yet the two are legally, and in fact, essentially distinct.—Gould on Waters, § 41. It can not be supposed that the law-making power was either ignorant of this distinction, or intended to confound the meaning of the words. It is conclusive of the whole question, that penal statutes are required to be strictly construed, and that this is a penal statute. We can not declare, under such a rule of construction, that the word *river* was intended to include a bay. The law, in our judgment, contemplates that the offense should have been committed on a steamboat while it was navigating one of the “*rivers of the State*.”

It was clearly competent for the witness Baldwin to testify, that he and others named, including the defendant, played a game with cards, without describing in detail the particular nature or character of the game played. The offense denounced is card-playing in general, and not the playing of any particular game of cards; provided only it is done on a steamboat, while navigating any one of the rivers within the jurisdiction of the State. The defendant could have tested the accuracy of the witness' knowledge, by a cross-examination, if he had so desired.

The recital of the judgment-entry, as to the oath administered to the jury, is fatally defective. While it recites that the jury were “sworn to well and truly try the issue joined between the State of Alabama and the defendant,” it omits the words, “and a true verdict render according to the evidence; so help you God.” The rule declared in *Story v. The State*, 71 Ala. 329, is, that where the judgment-entry in a criminal case purports to set out the full oath administered to the jury, it must express

[Cahall v. Citizens' Mutual Building Association.]

every essential element or ingredient of such oath, as prescribed by the statute. This is in accordance with our more recent rulings, as declared in the cases of *Allen v. The State*, 71 Ala. 5, and *Schamberger v. The State*, 68 Ala. 543. But, as often decided, the recital that the jury "were duly sworn," or were "sworn according to law," is clearly sufficient; and the adoption of this form is the safer practice for the *nisi prius* courts to pursue.—*Story v. The State*, *supra*, and cases cited.

It is not our purpose to decide, that if the indictment had been framed in another aspect, a conviction could not have been had for playing at cards on a steamboat in Mobile bay. *Coleman v. The State*, 13 Ala. 602; Code, 1876, § 27; 1 Bish. Cr. Law, § 176; 1 Whart. Cr. Law (8th Ed.) § 264.

We have examined the other exceptions, and are of opinion that they are not well taken.

The judgment is reversed, and the cause remanded.

Cahall v. Citizens' Mutual Building Association.

Action on Appeal Bond.

1. *Appeal bond; what damages are recoverable.*—An appeal bond, given in pursuance of the order of the presiding judge (Code, § 3928), on appeal from a judgment for the recovery of land or the possession thereof, and conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers all damages resulting to the plaintiff from the appeal and its legal consequences and incidents; that is, all damages of which the appeal is the moving cause, or the direct and immediate agency producing them; and this includes the value of the use and occupation of the premises pending the appeal, of which the plaintiff was deprived by the suspension of a writ of possession on the judgment.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by the appellee, a domestic corporation, against Green B. Cahall and others; and was founded on an appeal bond executed by said defendants, which was dated the 29th January, 1878, and conditioned as follows: "The condition of the above obligation is such, that whereas the above-bound Green B. Cahall applied for and obtained an appeal, returnable to the June term, 1878, of the Supreme Court of Alabama, to supersede and reverse a judgment recovered by the said Citizens' Mutual Building Association against the said

[Cahall v. Citizens' Mutual Building Association.]

Green B. Cahall, at the Fall term, 1877, of the Circuit Court of Mobile county, for the recovery of certain real estate, and also damages amounting to one dollar, besides costs; now, if the said Green B. Cahall shall prosecute to effect his said suit in the Supreme Court, and shall pay and satisfy all costs and such damages as the plaintiff may sustain by reason of this appeal, then this obligation to be null and void," &c. The order of the Circuit Court under which this bond was executed, prescribing its condition and amount of penalty, was in these words: "It is ordered by the court, that for the purpose of appealing this cause to the Supreme Court of Alabama, the defendant enter into bond with security, approved by the clerk, in the sum of five hundred and fifty dollars, conditioned to pay all costs, except Supreme Court costs, and all damages sustained by plaintiff by reason of the appeal."

The action was commenced on the 25th October, 1879. The complaint contained three counts, each of which alleged the affirmance of the judgment by this court on appeal, and the failure of the defendants to pay the damages which the plaintiff had sustained by reason of the appeal; the first claiming damages generally, without an averment of any special damages; and the second and third each claiming as damages the value of the use and occupation of the property while the appeal was pending in this court, from the 29th January, 1878, to the 1st July, 1879, and alleging that the plaintiff was kept out of the possession during that period by reason of the appeal and the execution of the bond. The defendants demurred to each count of the complaint, assigning specifically numerous grounds of demurrer to each; and their demurrers being overruled, they pleaded "the general issue." On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the bond on which the action was founded, and the order of court under which it was executed, as above set out. The defendants objected to the admission of the bond as evidence, "on the ground that the condition of said bond was not in conformity to said order of court as offered in evidence;" and they duly excepted to the overruling of their objection.

The plaintiff then introduced one Caldwell as a witness, "who testified, that the real estate referred to in the bond was the same as that mentioned in the complaint; that said Green B. Cahall remained in possession of said real estate, after the making of said bond, until the affirmance of the judgment against him in the Supreme Court, a period of seventeen months, when he surrendered the possession to the plaintiff; that the rental value of said property is \$20 per month, and that said Green B. Cahall has not paid said rent." Another witness for the plaintiff testified, that the rental value of the property was \$15

[Cahall v. Citizens' Mutual Building Association.]

per month; while a witness introduced by the defendants testified, that it was worth \$12 per month.

"This was all the evidence. The court thereupon charged the jury, of its own motion, among other things, that the loss of the rent of the premises, during the time the case was pending in the Supreme Court, was within the damages provided against by the condition of the bond; and that the plaintiff was entitled to recover the same in this action, to such an amount as they might find proved by the evidence." The defendants excepted to this charge, and requested the court, in writing, to charge the jury that, "unless the order of the court fixing the condition of the bond, and the condition of the bond itself, expressly imposed on the defendants the obligation of paying the value of the use and occupation of the premises during the pendency of the case in the Supreme Court, the defendants can not be held liable, in this suit, for such use and occupation, as damages occasioned by the appeal." The court refused to give this charge, and the defendants excepted to its refusal.

The rulings of the court on the pleadings and evidence, the charge given, and the refusal of the charge asked, are now assigned as error.

L. H. FAITH, for appellants.

MACARTNEY & CLARKE, *contra*.

BRICKELL, C. J.—The first proposition pressed by the appellants for the reversal of the judgment is, that the terms of the bond embrace only damages resulting from the appeal, and not damages resulting from the stay or suspension of execution of the judgment pending the appeal. This seems to us too narrow, and rather an illiberal construction of the condition of the bond, which is for the payment "of all costs, and such damages as the plaintiff may sustain by reason of this appeal." These words contemplate security and indemnity to the plaintiff against all damages resulting to him from the appeal and its legal consequences and incidents; all damages of which the appeal is the moving cause—the direct, immediate agency producing them. The purpose of the bond, as recited on its face, was an appeal suspending the execution of the judgment; and the purpose of the statute which authorizes its taking, is the stay or suspension of the execution, keeping the parties and the controversy *in statu quo* pending the appeal. The bond being executed, as was this bond, in pursuance of an order of the judge of the court in which the judgment was rendered, the legal incident and consequence of the appeal was, while it was pending, the suspension of the execution of the judgment. In

[Knight v. Haynie.]

the absence of the appeal, the bond could not have been taken; and without the appeal and bond, there could not have been a suspension of execution. The fair and just construction of the words of the condition of the bond is, that the obligors bound themselves, in the event of the affirmance of the judgment, to pay and satisfy the costs of the appeal, and all such damages as were the natural, proximate consequence of the appeal and its legal incident, the suspension of execution.

The judgment from which the appeal was taken was, that the plaintiff recover of the defendant the premises, or the possession of the premises in controversy. The only writ which could issue for the enforcement of the judgment, other than a *fiery facias* for the costs adjudged against the defendant, was a writ of *habere facias possessionem*, directed to the sheriff, and commanding him to put the plaintiff in possession. The issue and execution of this writ was suspended, or superseded, by the appeal and bond, until the judgment of this court was pronounced. Security, indemnity against loss or injury, resulting to the plaintiff directly from the suspension of the execution of the judgment, it is the manifest object of the statute, and of the bond required, to afford. The loss of the possession, the value of its use, pending the appeal, is the immediate consequence of the suspension of the execution, for which the plaintiff is entitled to compensation; and if it is not made, the condition of the bond is broken.—*Drake v. Webb*, 63 Ala. 596; *Zeigler v. David*, 23 Ala. 127.

Let the judgment be affirmed.

Knight v. Haynie.

Final Settlement of Executor's Accounts.

1. *Liability of executors for acts of each other.*—When executors act separately, and do not become bound for each other by the execution of a joint bond, each has an equal right to receive the assets of the estate, whether money, or any other kind of chattels; and one is not responsible for a *derastavit* committed by the other, unless he has in some way contributed thereto, or has made himself liable by his gross negligence.

2. *Same.*—An executor who is merely passive, by not obstructing his co-executor in receiving the assets, and who does not himself concur in the application of them, is not responsible for them; but, when one receives assets, and pays them over, voluntarily and unnecessarily, to his co-executor, by whom they are embezzled or lost, he who so paid them over is answerable with the other, unless he can show a sufficient excuse; and in the case of several executors, who by agreement divide the claims

[Knight v. Haynie.]

of the estate among themselves for collection, each returning a separate inventory, each is liable for the whole, because the receipts of each are pursuant to the agreement between them.

3. *Duty and liability of executor who is also administrator of debtor's estate.*—When an executor becomes also the administrator of the estate of a deceased debtor to his testator, and receives assets sufficient to pay the debt, both estates being solvent, it is his duty at once to make the application; and he is not discharged from liability by paying it over to his co-executor, pursuant to an agreement between them for dividing the collection of the assets, particularly when the habits, health, and pecuniary circumstances of such co-executor should have awakened inquiry on his part.

APPEAL from the Probate Court of Mobile.

Tried before the Hon. PRICE WILLIAMS, Jr.

In the matter of the final settlement of the accounts of Thomas A. Knight, as one of the executors of the last will and testament of Monroe P. Watts, deceased, after his resignation. The only matter assigned as error is the ruling and decree of the Probate Court in charging said executor with \$2,800, part of a sum of \$5,000 which he had paid over to his co-executor, J. P. Routon, since deceased, who failed to account for it, and died insolvent. The material facts of the case, as shown by the evidence set out in the bill of exceptions, are stated in the opinion of the court.

WATTS & SON, and OVERALL & BESTOR, for appellant, cited *Williams v. Harrison*, 19 Ala. 277; *Turner v. Wilkins*, 56 Ala. 173; *Peter v. Beverly*, 10 Peters, 532; *Edmonds v. Crenshaw*, 14 Peters, 166; *Jones v. Jones*, 42 Ala. 218; *Stell's appeal*, 10 Penn. St. 153; *Boyd v. Boyd*, 1 Watts, 367; *Ochiltree v. Wright*, 1 Dev. & Bat. 336; *Williams v. Wiggins*, 1 Ired. Eq. 92; *Sutherland v. Brush*, 7 Johns. Ch. 22; *Brazier v. Clarke*, 5 Pick. 96; *Gates v. Whetstone*, 8 So. Car. 244; *Knox v. Pickett*, 4 Dess. 92; *Hall v. Carter*, 8 Geo. 388; *Lenoir v. Winn*, 4 Dess. 65; *McNair's appeal*, 4 Rawle, 147; *Richardson v. Richardson*, 9 Penn. St. 431; *Verner's appeal*, 6 Watts, 253; *Bacon v. Bacon*, 5 Vesey, 331; *Clarke v. Blount*, 2 Dev. Eq. 51; *Gaultney v. Nolan*, 33 Miss. 569; *State v. Belen*, 5 Harr. 400; *Ray v. Doughty*, 4 Blackf. 115; *Davis v. Spurling*, 1 Russ. & My. 66; *Boyd v. Boyd*, 3 Gratt. 113; 2 Lomax on Executors, 490, sec. 22; 2 Williams on Executors, 1648-50, notes.

HERNDON, CROOM & LEWIS, *contra*, cited 2 Williams on Executors, ed. 1859, pp. 1650, 1927-8, 1932; *Edmonds v. Crenshaw*, 14 Peters, 166; *Stewart v. Connor*, 4 Ala. 814; *Monell v. Monell*, 5 Johns. Ch. 283; 2 Barb. Ch. 151; 1 Wendell, 583; 9 Cowen, 734; *Purdum v. Tipton*, 9 Ala. 914; *Modawell v. Hudson*, 57 Ala. 75; *Miller v. Irby*, 63 Ala. 484.

[Knight v. Haynie.]

STONE, J.—Monroe P. Watts died, leaving a will, and therein appointed three executors, Wragg, Routon, and Knight, and relieved them from giving bond as such executors. The estate was considerable. Each executor qualified on the same day, but by separate letters of appointment. The estate consisted largely of what in mercantile phrase are called “bills receivable.” Among the dues was a demand on one Yeldell, of about five thousand dollars. The three executors, by agreement among themselves, divided the assets, each taking a part. Wragg took much the larger share, and, among others, the claim on Yeldell. Each executor returned a separate inventory, the claim on Yeldell being in Wragg’s. Wragg, it appears, was active in administration; and in a relatively short time he had realized sufficient moneys to pay off the debts of the estate, which he did, and left a surplus of money in his hands. Yeldell, in the meantime, had died, and the claim on him had not been collected. His estate was solvent, but it required a sale of his lands, or a part of them, to pay his debts.

Wragg resigned his executorship, and came to a settlement, the correctness of which is not questioned in this proceeding. For the money balance in his hands, a decree was rendered in favor of the continuing executors, Routon and Knight. Routon alone attended the settlement, and the moneyed decree, together with the unadministered assets in Wragg’s hands, were turned over to him, Routon. Among these was included the Yeldell note. Routon then placed this note in the hands of an attorney, and had it reduced to judgment in favor of himself and Knight, as continuing executors, and against the personal representatives of Yeldell. After this, Knight became one of the administrators of Yeldell’s estate, and under a petition by him, together with his co-administrators, the lands of the latter estate were sold, to pay the Watts and, possibly, other debts. Knight appears to have been the most active of the Yeldell administrators. The money for the Yeldell lands, it would seem, was not all paid at once, probably in accordance with the terms of sale. This, we think, is shown by the fact, that the money collected for the Yeldell estate was applied to the Watts indebtedness at different times, and in different amounts; the dates ranging from November 18th, 1875, to January 26th, 1877. The whole amount applied within these dates was five thousand dollars, as follows: Nov. 18th, 1875, \$2,000; Nov. 20th, 1875, \$500; Jan. 9th, 1877, \$730; Jan. 26th, 1877, \$1,770. In form, these several payments were made by Knight, administrator of Yeldell, to Routon, executor of Watts. Routon died in the spring of 1877, wholly insolvent, but having previously paid twenty-two hundred of the five thousand dollars, on legacies bequeathed under Watts’ will. The question raised by

[Knight v. Haynie.]

the record is, whether Knight shall be held to account for the residue of the five thousand dollars—twenty-eight hundred dollars. The Probate Court decreed that he should.

It is contended for appellant, that Knight received and held the money as the administrator of Yeldell, and never as the executor of Watts; that it never became the property of the estate of Watts, until it passed from the hands of Knight to the hands of Routon. The argument goes farther, and claims that the ownership of the money could not change, until Routon received it, because he, Routon, was charged with the collection of this particular claim. If this postulate can be maintained, as the legal result of the facts, then the conclusion contended for would seem to follow. When executors act separately, and do not become bound for each other by the execution of a joint bond, each has the equal right to receive the assets of the estate, whether money, or any other species of chattels; and for a *devastavit* by one, the other is not responsible, unless he has, in some way, contributed thereto, or has made himself liable by his gross negligence.—*Turner v. Wilkins*, 56 Ala. 173; *Williams v. Harrison*, 19 Ala. 277; *Stell's appeal*, 10 Penn. St. 149; *Boyd v. Boyd*, 1 Watts, 365; *Brazier v. Clark*, 5 Pick. 96; *Lenoir v. Winn*, 4 Dess. 65; *Boyd v. Boyd*, 3 Gratt. 113.

But we think the facts of this case do not justify the application of the principle stated above. Knight was the personal representative of each estate, and both estates were solvent. He had independent, complete power to receive the moneys due to each estate, and to disburse them in due course of administration; and when he had in his hands moneys belonging to the debtor estate, it was his duty to apply them towards the extinguishment of the undisputed claim of the creditor estate.

Whitworth v. Whitworth, 39 Ala. 286; *Seawell v. Buckley*, 54 Ala. 592; *Modawell v. Hudson*, 57 Ala. 75; *Miller v. Irby*, 63 Ala. 477; *Flinn v. Carter*, 59 Ala. 364; *Lee v. Lee*, 67 Ala. 406. In such a case as this, our rulings give the creditor, or beneficiary, the option of proceeding in either right, against a debtor filling a dual relation; that is, for money received, because the demand is presumptively collected; or for culpable *laches*, in failing to apply, and thus collect, when he could and should have done so.—*Whitworth v. Whitworth*, and *Flinn v. Carter*, *supra*.

We can not assent to the proposition, that under the facts of this case, Routon was, any more than Knight, charged with the duty and power of collecting the Yeldell debt. It was as much the duty of the one as the other. We go farther. When Knight had the moneys of the Yeldell estate, and resolved to apply them to the Watts claim, it was, at the option of the beneficiaries, as much a payment, as it became when he actually

[McCarthy v. McCarthy.]

handed the money to Routon. He, therefore, contributed actively in placing the money out of the rightful, lawful custody of himself, into Routon's custody; and that, too, when Routon's habits, health, and pecuniary circumstances should, at least, have awakened inquiry.

We approve and adopt the following language, which, without material change, we find in the text of both Williams and Lomax, in their works on Executors; Williams, 5th Amer. ed., vol. 2, p. 1651; 2 Lomax, marg. p. 298: "An executor who is merely passive, by not obstructing his co-executor in receiving the assets, and who does not himself concur in the application of them, is not, it seems, answerable. But, where one executor receives the whole or a part of the testator's estate, and pays it over voluntarily and unnecessarily to his co-executor, and the same is embezzled or lost, he who so paid it over is answerable with the other, unless he can assign a sufficient excuse. Thus, in the case of several executors, if, by agreement among themselves, one is to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made between them."—*Peter v. Beverly*, 10 Pet. 532; *Edmonds v. Crenshaw*, 14 Pet. 166; *Monell v. Monell*, 5 John. Ch. 283; *Williams v. Maitland*, 1 Ired. Eq. 92; *Gates v. Whetstone*, 8 So. Car. 244; *Sutherland v. Brush*, 7 Johns. Ch. 17; *Hall v. Carter*, 8 Ga. 388; *Gaultney v. Nolan*, 33 Miss. 569; *Ray v. Dougherty*, 4 Blackf. 115.

The cases of *Bacon v. Bacon*, 5 Ves. 331, and *Davis v. Spurling*, 1 Russ. & Myl. 64, rest on their peculiar facts, and are no authority against these views. *McGregor v. McGregor*, 35 N. Y. 218, is scarcely reconcilable with our rulings; and *The State v. Belin*, 5 Harr. 400, is too meagerly reported to shed any light on the question. The case of *Verner's estate*, 6 Watts, 250, we decline to follow; and *McNair's appeal*, 4 Rawle, 148, we need not consider.

The decree of the Probate Court is affirmed.

McCarthy v. McCarthy.

Bill in Equity against Administrator and Heirs of Deceased Trustee, for Account of Rents and Profits.

1. *Trust created by deed.*—An express trust, as distinguished from a trust implied by law, is created by the direct and positive act of a party,
VOL. LXXIV.

[McCarthy v. McCarthy.]

manifested by some instrument of writing; and when the legal title to property is conveyed to one person, to be held by him for the benefit of another, an express trust is created, without regard to the particular words or form of the conveyance.

2. *Marriage-settlement construed as creating express trust; purchase of life-estate by trustee.*—A deed executed in contemplation of marriage, by which the grantor conveys property to a third person, “upon trust and confidence,” and “for the sole use, profit and benefit of” the intended wife during her life, with remainder to the surviving child or children of the marriage, creates an express trust; and the wife, after the death of the husband and grantor, having sold and conveyed her interest to the trustee, declaring in the deed that, on her death, he was to surrender the property to her surviving child, the legal title is henceforth held by the trustee for his own use and benefit, during the life of the wife, with the right of possession and to collect and hold the rents and profits, and there is an express trust in favor of the remainder-man.

3. *Statute of limitations, and adverse possession, as between trustee and beneficiaries.*—The statutes of limitation do not apply to express trusts, which are peculiarly and exclusively the subjects of equity jurisdiction; the possession of the trustee being considered the possession of the *cestuis que trust*, and not becoming adverse until there has been an open disavowal of the trust, brought home to the knowledge of the beneficiary with unquestionable certainty; and such a trust is only barred, on the doctrine of prescription, by the lapse of twenty years.

4. *Discharge of trustee.*—A trustee may be discharged from his fiduciary relation, either by the expiration of the trust, or by its full performance, which involves a settlement between him and the beneficiary, and a surrender or transfer of the property; but the execution of a conveyance as a deed of gift, accompanied with a surrender of the property, can not operate to discharge him from his fiduciary relation, nor relieve him from liability to account for the rents and profits received, the beneficiary being an infant remainder-man, who had long resided with the trustee as a member of his family, and was ignorant of the existence of the trust.

5. *Fraud, as exception to statute of limitations.*—An infant remainder-man under a deed, residing from infancy with the trustee as a member of his family, and being kept in ignorance of the trust and her rights under it, until the discovery and surrender of the deed on the death of the trustee, is allowed twelve months after such discovery within which to file a bill for an account of rents and profits received (Code, § 3242), if the statute of limitations be applicable to the case; and she is not chargeable with constructive notice of the deed, under such circumstances, because it had been duly recorded many years before.

6. *When creditor may maintain bill against administrator and heirs of deceased debtor, without exhausting legal remedies.*—A creditor can not, in the absence of some special equity, maintain a bill in equity to reach and subject the lands of his deceased debtor, until he has exhausted his legal remedies by a judgment at law against the administrator, and the return of an execution unsatisfied against him and his sureties; but this principle does not apply to a bill filed by the beneficiary of an express trust, against the administrator and heirs of the deceased trustee, for an account of rents and profits received.

7. *Parties to bill; joinder of heirs and administrator as defendants.* When a bill seeks an account of rents and profits received by a deceased trustee, whose estate, though solvent, consists mostly of lands, the heirs are properly joined with the administrator as defendants, being interested in the account; and they may make any defense which would be available to the administrator.

8. *Multifariousness.*—When a bill does not state facts which render it multifarious, the prayer for relief can not render it multifarious.

[McCarthy v. McCarthy.]

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 5th October, 1880, by Mrs. Joanna McCarthy, a married woman, whose maiden name was Millrick, or Milerick (as the name is indifferently spelled in the transcript), and who was the daughter and sole child of Richard and Mary Millrick, deceased; against the widow, administratrix and heirs of James McCarthy, deceased; and sought an account of the rents and profits of certain real estate in the city of Mobile, alleged to have been received by said James McCarthy, as trustee, for the use and benefit of the complainant, and never accounted for or paid over to her. The complainant claimed the property under a deed, a copy of which was made an exhibit to her bill, and which was dated February 4th, 1852. By this deed, said Richard Millrick, in contemplation of his intended marriage with Mary Lahey, who was the step-daughter of said James McCarthy, conveyed the property "to said James McCarthy, his heirs and assigns, upon the trust and use, intent and purpose, hereinafter limited and declared; to have and to hold the same to him, the said James McCarthy, his executors and administrators, upon trust and confidence, nevertheless, for the sole use, profit and benefit of the said Mary Lahey that now is, and her heirs by our said intended marriage, if any; but, in the event of the said Mary dying without issue, and the said Richard Millrick should survive her, said McCarthy is bound by this instrument to re-convey to the said Richard the above-mentioned parcel and lot of land." The deed contained an express covenant on the part of the trustee, "faithfully to perform and fulfill the trust aforesaid;" and it was signed by both him and the grantor, duly acknowledged by both of them, and recorded on the day after its date.

Richard Millrick died in 1855, leaving the complainant as the only child of the marriage. Afterwards, on the 30th July, 1855, Mrs. Mary Millrick, the widow, conveyed her interest in the property to said James McCarthy, the trustee, in consideration, as therein recited, of \$150 in hand paid; the deed containing these words: "To have and to hold my said interest in and to said lot of land, to himself, the said James McCarthy, for his own exclusive use and benefit, for and during my life; for it is expressly understood that the interest, or *quantum* of the estate of the said Mary Millrick, is a life-estate only, and after her death, her infant daughter Joanna is legally entitled to the same; as will more fully appear by reference to a deed executed by Richard Millrick, myself and the said James McCarthy, bearing date the 4th February, 1852, and which was executed in consideration of the intended marriage between myself and the said Richard; which marriage took place, and

[McCarthy v. McCarthy.]

my daughter Joanna is the only issue of said marriage, and said Richard Millrick has departed this life. Therefore it is that I have a life-estate in said lot, and my daughter the remainder; and I sell my life-estate in manner aforesaid, and at my death the said James McCarthy is to deliver up and surrender said lot to my daughter Joanna, or her heirs; but, until my death, he, the said McCarthy, is not to be accountable to any one for the rents or profits of the said lot, but shall receive and hold the same for his own use."

Mrs. Mary Millrick died in August, 1858, and her infant daughter thenceforward resided in the house of said James McCarthy, as a member of his family, until her marriage in 1876. The bill alleged that said McCarthy took possession of the property, claiming and treating it as his own after his purchase of the life-estate, and receiving the rents and profits, until he surrendered the possession to the complainant on her marriage; that on the night of her marriage he delivered to her a deed of gift of the property, a copy of which was made an exhibit to the bill; that said McCarthy "intentionally and fraudulently concealed" from her all information of the said deeds above mentioned, and she had no knowledge or notice of her rights and interest in the property until after the death of said McCarthy, in November, 1879, when the deeds were found among his papers, and were then delivered to her by the attorney of the administratrix. It was alleged, also, that the estate of said McCarthy was solvent, and owed no debts, but that the property consisted mostly of real estate, and the personal assets were not sufficient to pay the complainant's claim as asserted in her bill. On these facts and allegations, the bill prayed an account of the rents and profits of the property from the death of Mrs. Millrick, and a decree against the administratrix and heirs for the amount found due; and on their failure to pay it within a time named, "that it be decreed a charge on the real property of said estate, and the same be ordered to be sold to satisfy the same."

The administratrix filed a demurrer to the bill, on the grounds of multifariousness and misjoinder of parties, and "because it seeks to declare a debt of said James McCarthy a charge upon the real estate, without alleging that there is not a sufficiency of personal property to pay the same." The heirs joined in this demurrer, but they filed no answer, though a formal answer was filed by the guardian *ad litem* of one who was an infant. An answer was filed by the administratrix, admitting the execution of the several conveyances as above stated, and denying that there was any fraudulent concealment of the complainant's rights on the part of said McCarthy; alleging that he supported, clothed and educated the complainant from infancy,

[McCarthy v. McCarthy.]

after her mother had deserted her, and that the sums so expended by him, with taxes paid, and repairs and improvements made, exceeded the rents and profits received.

The prayer of the bill was afterwards amended, by leave of the court, by adding these words: "Or, if the court should be of the opinion that it has no jurisdiction to charge the amount found to be due to complainant on the lands descended to the heirs, or to order the land to be sold to pay the same, that the court will then require said respondents to show what amount said James McCarthy received, or ought to have received, as the rents, issues and profits of said trust estate, and will decree that said administrator pay the same as a liability against said estate, if she has the money sufficient to pay the same; and if not, that such amount be established as a liability against said estate, for which said administratrix may apply to the Probate Court for an order to sell said realty, or so much thereof as may be necessary to pay the same, unless said heirs come forward and discharge said liability."

The chancellor overruled the demurrers to the bill, and, on final hearing on pleadings and proof, held that the complainant was entitled to relief; and he ordered an account to be stated by the register, as to the amount of rents received from the property by said James McCarthy after the death of the complainant's mother, the value of the repairs and improvements made by him during the same period, and the expenses of the complainant's maintenance and education, after deducting the value of her personal services in his family during that time. At the next term, the register reported the accounts as stated by him, showing a balance of \$4,400 due to the complainant, excess of rents above expenditures; and the report being confirmed without objection, the chancellor rendered a decree for that sum against the administratrix, and ordered an execution to be issued, if the amount was not paid within five days after the adjournment of the court, to be levied of the goods and chattels, rights and credits of the said James McCarthy, in her hands to be administered. From this decree all of the defendants appeal, and they jointly assign as error the overruling of the demurrers to the bill, and each of the chancellor's decrees.

J. L. & G. L. SMITH, for appellants.—(1.) To charge the lands of the deceased, the bill should have been filed in the name of all the creditors, and should have alleged a judgment against the administratrix, and the insolvency of her and her sureties.—*Scott v. Ware*, 64 Ala. 181; *Darrington v. Borland*, 3 Porter, 10. Being defective as a bill to charge the lands, no cause of action against the heirs was shown, and hence there was a misjoinder of parties.—Cases *supra*. It is doubtful

[McCarthy v. McCarthy.]

whether the bill shows a case within the jurisdiction of the court.—*Abrams v. Hall*, 59 Ala. 386. (2.) The heirs were not proper parties, and properly objected by their demurrer, which was overruled; and though no decree was rendered against them, they are concluded by the decree, and will thereby be prevented from pleading the statute of limitations, when the administratrix attempts to procure an order from the Probate Court to sell the lands.—*McDonald v. Mobile Life Ins. Co.*, 65 Ala. 258; *Mervine v. Parker*, 18 Ala. 241; *Trustees v. Keller*, 1 Ala. 406; *Tarver v. Davis*, 65 Ala. 98; *Scott v. Ware*, 64 Ala. 174. (3.) By the express terms of the deed executed by Richard Millrick to McCarthy as trustee, the trust terminated on the death of Mrs. Millrick, and the legal title then vested in the complainant; and no trust whatever in her favor was created by Mrs. Millrick's conveyance to McCarthy. *Comby v. McMichael*, 19 Ala. 747; *McBayer v. Cariker*, 64 Ala. 50. The rents were received subject only to an implied trust, and the claim was within the bar of the statute of limitations.—*Maury v. Mason*, 8 Porter, 218; *James v. James*, 55 Ala. 532; *Martin v. Br. Bank*, 31 Ala. 115; *Lockard v. Nash*, 64 Ala. 385. The bar of the statute is not avoided by the complainant's minority, since the bill was filed more than three years after she had attained her majority; and the proof fails to sustain the allegations of a fraudulent concealment.—*James v. James*, 55 Ala. 525; *Martin v. Br. Bank*, 31 Ala. 115; *Underhill v. Fire Dep. Ins. Co.*, 67 Ala. 50. It was not necessary that the statute of limitations should be specially pleaded, the facts out of which it arises being stated in the answer (Code, § 3783); but, if the statute is not properly pleaded, the greater part of the claim is a stale demand, and this defense arises on the proof.—*Johnson v. Johnson*, 5 Ala. 90; *James v. James*, 55 Ala. 525; *Nettles v. Nettles*, 67 Ala. 599. The facts of this case show with peculiar force the justness and propriety of this equitable defense; this trustee being an uneducated man, who kept no accounts of rents or expenses, and whose estate is now sought to be charged with an accumulation of rents, during a long period of time, on a basis which few trust estates have earned under the most prudent management.

OVERALL & BESTOR, *contra*.—The deed from Millrick to James McCarthy, which was accepted by the latter, creates an express trust.—2 Story's Equity, §§ 962–64, 974–77, 981–83. Such a trust is exclusively of equitable cognizance, and the statutes of limitations do not apply to it; and if the statute was applicable, it was waived because not specially pleaded.—*Boling v. Jones*, 67 Ala. 508; *Brooks v. Norris*, 11 Howard, 204. If the benefit of the statute had been properly invoked, the

[McCarthy v. McCarthy.]

averments of ignorance and fraudulent concealment would avoid its operation; and these averments are fully sustained by the proof. The heirs were properly joined as defendants with the administratrix, because there was a deficiency of personal assets, and they were interested in the account to be stated, the lands being liable for the debt after the personalty was exhausted.—Story's Eq. Pl. §§ 172-3. That the bill was not multifarious, see cases cited in 1 Brickell's Digest, 719, § 1158.

SOMERVILLE, J.—An *express* trust, as distinguished from one that is merely implied by law, is a trust created by the direct and positive act of a party, manifested by some instrument of writing, whether by deed, will, or otherwise.—2 Story Eq. Jur. § 980. Every trust is clearly of this class, where the legal title of property is conveyed to a trustee, to be held by him for the benefit of another, no particular words or formality being required for its creation.—1 Perry on Trusts, § 82; Law of Trusts (Tiff. & Bul.) 11; 2 Story's Eq. Jur. § 980; *Cresswell v. Jones*, 68 Ala. 420.

There can be no question of the fact, in our opinion, that the appellants' intestate, James McCarthy, was the trustee of an express trust, under the plain construction of the two deeds by which was conveyed to him the lot of land described in complainant's bill. The deed from Richard Millrick, designed as a marriage-settlement for his intended wife, expressly declares, in the *habendum* clause, that he was to hold the lot "upon trust and confidence," and "for the sole use, profit and benefit of Mary Lahey," the mother of the complainant, during her life; and words are used which unquestionably create a remainder in the complainant, she being the sole surviving heir of her mother by the contemplated marriage.—*May v. Ritchie*, 65 Ala. 602. The nature of the trust is still further emphasized by the deed of Mary Millrick, by which she sold and conveyed her life-estate in the property to McCarthy, her trustee, with an express declaration that he was to surrender it to the complainant upon the grantor's death. We find in the contents of these written instruments every element which goes to characterize an express trust, under the definition which we have above stated. Upon their execution and delivery, the legal title of the entire property became vested in James McCarthy, for the benefit of himself during the life of Mary Millrick, with equitable remainder of the usufruct in favor of complainant, with the right of possession also in the trustee, and the incidental power to collect the rents and profits. Among the most common class of express trusts are those created by marriage-settlements, as also conveyances to trustees to receive the rents

[McCarthy v. McCarthy.]

of the trust property, to be applied to the use of designated beneficiaries.

In this view of the case, it is immaterial whether the statute of limitations was properly pleaded or not, inasmuch as this defense has no application to express trusts of this particular character.—2 Brick. Dig. 217, § 10; 2 Perry on Trusts, § 863. The possession of the trustee is considered to be also the possession of the beneficiary, and, consequently, is not hostile or adverse within the meaning of the statute, until there is an open disavowal of the trust, which must be brought home to the knowledge of the beneficiary with unquestionable certainty. Until this is done, no length of time, less than twenty years, will operate as a bar; and this rule of twenty years is one of presumptive evidence, based on the doctrine of prescription, and not upon the statutes of limitation.—*Garrett v. Garrett*, 69 Ala. 429; 2 Perry on Trusts, § 863; Law of Trusts (Tiff. & Bul.), 716. It is true that there are some cases, of mere money trusts, where the remedy at law and that in equity are concurrent, and the statute of limitations has been adjudged to apply alike in both forums.—*Maury v. Mason*, 8 Port. 222; *Wood v. Wood*, 3 Ala. 756. But it seems generally settled, that the statute is no defense to such express or direct trusts as are peculiarly and exclusively the subjects of equity jurisdiction, and are subsisting, recognized and acknowledged, as between the trustee and *cestui que trust*.—*Maury v. Mason*, *supra*.

In *Pinkston v. Brewster*, 14 Ala. 315, we have a case essentially similar in principle to the one in hand. There, certain property had been conveyed to the defendants as trustees in a deed of trust. They sold the property under the power conferred in the deed, and misapplied the proceeds. Upon bill filed against them by the beneficiaries, it was held that the trust was a direct one, peculiarly and exclusively cognizable in a court of equity, and that the statute of limitations of six years was no bar to the suit. The general rule, as stated by Mr. Perry in his work on Trusts, seems to be, that “where the *cestui que trust* seeks an account of the rents and profits from an *express* trustee, there is no limitation of time, as the statute of limitations does not apply.” If the claim to rents and profits rests upon the *legal* title, the remedy may be then at law, and the legal limitation be adjudged applicable.—2 Perry on Trusts, § 871.

It is insisted, however, that the trust assumed by James McCarthy terminated in September, 1876, when he conveyed the *corpus* of the trust property to complainant, upon the occasion of her marriage, and that it does not, therefore, come within the above rule, as being yet subsisting and acknowledged. We understand the rule to be, that a trustee may, of course, be dis-

[McCarthy v. McCarthy.]

charged from his fiduciary relation, either by the expiration, or by the full performance of the entire trust. This involves the duty of a settlement between him and the *cestui que trust*, accompanied with a conveyance or transfer of the trust property according to the terms of the trust.—2 Perry on Trusts, §§ 921-922. It can not be justly contended, that there was any thing resembling a settlement of the trust in this case. The evidence shows that the complainant was kept in ignorance of her ownership of the trust property, during the entire period of her minority. When the deed was delivered to her by McCarthy, it was under the ostentatious guise of a mere gift, or benefaction. Nothing was disclosed as to the trust nature of the property, and hence nothing was known as to the rents, which had for so many years been collected and appropriated by the simulated donor, during the period of time when the legal title to the trust property was in him. It would be in the very teeth of equity and good conscience to call this an accounting to the *cestui que trust*; and the trustee can not be discharged, until he has accounted in such a manner as the court shall consider that he ought to have done.—*Wedderburn v. Wedderburn*, 4 Myl. & Cr. 53; *Beckford v. Wade*, 17 Vesey, 100; *Law of Trusts* (Tiff. & Bul.), 715-716. All express trusts of this character must be regarded as continuing to subsist, until there is an open disavowal or repudiation of the trust, by clear and unequivocal words or conduct on the part of the trustee, and this is brought to the notice or knowledge of the *cestui que trust*.—2 Perry on Trusts, § 864. Until there is a settlement of the trust, or an open and unmistakable repudiation of it, it can not, in the absence of expiration, be regarded otherwise than as subsisting. It has been said, that it is the duty of the trustee, if he intends to claim the estate, to resign the trust, and deliver over the possession which he received as trustee.—2 Perry on Trusts, § 863. As to the rents collected and misappropriated by McCarthy, we are of opinion that the trust, under the circumstances of this case, had not terminated, and that the statute of limitations of six years was no bar to their recovery. To permit an express trustee to escape liability by conveying to the *cestui que trust* the *corpus* of the trust property, and at the same time to secretly withhold the rents, would be to allow an unwarrantable fraud upon the jurisdiction of the Chancery Court.

We are, furthermore, of opinion that the averments of fraud are sufficiently sustained by the proof, to take the present case out of the operation of the statute of limitations, even if it be applicable upon general principles. The statute allows the aggrieved party twelve months within which to sue after the discovery of "the facts constituting the fraud."—Code, 1876,

[McCarthy v. McCarthy.]

§ 3242; *Porter v. Smith*, 65 Ala. 169. The evidence strongly supports the averment of complainant's entire ignorance of her rights until within a few months before the filing of the present bill. The trust in McCarthy was created before the birth of complainant, and he is shown to have purchased the life-estate in the trust property from Mrs. Millrick when the complainant was an infant of tender years, residing with him beneath his roof, as a member of his family, and under his care and maintenance. This property he claimed as his own, collecting and appropriating the rents as if he were the owner of them in fee-simple. Upon the marriage of the complainant, he made what purported to be a mere gift of the trust property to her, which, of itself, was a re-assertion of his private ownership, and a misrepresentation of the capacity in which he really held it, which was that of a trustee for the complainant. These facts, under all the circumstances, must be construed as a fraudulent concealment of the cause of action on the part of McCarthy. The evidence satisfies us that complainant was excusably ignorant of the existence of the trust until the trust deeds, which were found among the papers of the trustee after his death, were brought to light, and delivered to her as muniments of her title to the trust property. These deeds, it is true, were recorded, one of them as far back as the year 1852, and the other about three years later. We do not think, however, that the constructive notice of the nature of McCarthy's possession, as imported by these deeds, should charge the complainant with a knowledge of her rights. The blind ignorance in which she seems to have been kept, by the fraudulent conduct of her trustee, was sufficient to drown all suspicion of unfairness, and stupify the activity of inquiry, particularly in view of the fact of her infancy, her position of dependence, and the relations of confidence existing between her and McCarthy, with its attendant influence exerted by these facts.—2 Perry on Trusts, § 867; *James v. James*, 55 Ala. 525; *Johnson v. Johnson*, 5 Ala. 90; *Morgan v. Morgan*, 69 Ala. 80.

It is contended that the Chancery Court has no jurisdiction in this case, because the complainant did not first exhaust her remedies at law, by obtaining a judgment in a court of law, and pursuing to insolvency the personal representative of the deceased debtor and the sureties on her administration bond. This is undoubtedly the established rule, where the creditor of a decedent invokes the jurisdiction of a court of equity, in order to subject lands, descended or devised, to the payment of a debt of the deceased owner, and there is *no other separate and distinct ground of equity jurisdiction* shown by the complainant's bill.—*Scott v. Ware*, 64 Ala. 174, and cases cited. The court here, however, having taken jurisdiction of the case,

[McCarthy v. McCarthy.]

upon the distinct ground of bringing a trustee to an account of his trust, will make its jurisdiction effectual for the purposes of complete relief, and will not drive the complainant to a court of law, that he may first establish his claim, by obtaining judgment with the return of *nulla bona* against the administratrix and her sureties. This could be required only on the false theory, that a court of equity will decline jurisdiction of trusts, unless there be an additional or superadded ground of jurisdiction, at least in cases of the present character.—*Johnson & Seats v. Smith's Adm'r*, 70 Ala. 108; *Shipman v. Furniss*, 69 Ala. 555; *Dargan v. Waring*, 11 Ala. 988. The bill avers that the estate of the deceased trustee consisted entirely of real estate, and that he owned no personal property liable to the satisfaction of his debts, and owed no other debt than that due the complainant; and these facts are not denied in the answer.

There is no misjoinder of parties defendant to the bill. The purpose of the bill is to establish a trust claim against the decedent's estate, so as to bind the realty of which he died seized. The heirs were interested in the taking of this account, as the real estate in their hands was an auxiliary fund liable to be charged with the debt in the absence of any personal property, which was a primary fund for this purpose.—*Story's Eq. Pl.* (9th Ed.) §§ 172-173; *Steele v. Steele's Adm'r*, 64 Ala. 438. They were therefore proper, if not indispensable parties, and had a right to make any defense against the claim which would have been available to the personal representative. It is no objection that the judgment precludes them from such defenses upon an application by the administrator to the Probate Court to sell the lands of the decedent to pay the debt. This was the very purpose for which they were made parties, so as to prevent unnecessary litigation.

There is nothing in the suggestion as to the bill being multifarious. Where a bill is not rendered multifarious by an alternative statement of facts, it cannot be rendered so by an erroneous prayer, invoking some particular relief to which the complainant is shown not to be entitled. It is the distinct and unconnected nature of the several matters stated by way of fact in the bill, and not the redundancy of the prayer for relief, which renders it objectionable on the ground of multifariousness.

The decree of the chancellor is affirmed.

Allen v. The State.

Indictment for Forgery.

1. *Forgery of order on merchant, for goods.*—A writing addressed to a mercantile firm, in these words, "Let A., the bearer, have what articles he wants, and present bill to be paid on 1st of month at my office," signed "*George Spaulding*, steamboat agent," is an instrument by which a pecuniary demand or obligation purports to be created (Code, § 4340), and the false making of which, with intent to defraud, is forgery in the second degree.

2. *Sufficiency of indictment.*—An indictment which charges that the defendant, "with the intent to injure or defraud, did falsely make or forge an instrument" (or "an instrument in writing purporting to be the act of *George S.*"), "in words and figures substantially as follows," setting out a written order the false making of which is forgery in the second degree, is sufficient.

3. *Organization of petit jury; objection to action of court made at instance of objector.*—In a criminal case, the defendant can not be heard to complain on error, that the court ordered more than the necessary number of talesmen to be summoned to complete the petit jury, when the record affirmatively shows that this was done at his instance and request.

4. *Proof and presumption as to fraudulent intent and forgery.*—There being no proof of the existence of the forged order, until it was produced by the defendant and credit for goods obtained by him on the faith of it, the jury may infer an intent on his part to defraud, and, if necessary, that he forged the paper.

5. *Charge asked, not shown to have been in writing.*—The refusal of a charge asked, which is not shown to have been asked in writing, is not a reversible error.

6. *Charges given, but not shown to have been so indorsed.*—It is not necessary that the record shall affirmatively show that charges given on request, or refused, were indorsed as required by the statute (Code, § 3109); in the absence of a recital to the contrary; and exception duly reserved on account of it, this court will presume that the charges were properly so indorsed.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The indictment in this case was for the forgery of an order, or instrument of writing, in these words: "*Tonsmeire & Craft*: Let Mr. Allen, the bearer, have what articles he wants; present bill to be paid, on 1st of month, at my office;" which was dated April 19th, 1883, and purported to be signed by "*George Spaulding*, steamboat agent." The first count of the indictment charged that the defendant, "with the intent to injure or defraud, did falsely make or forge an instrument in writing, purporting to be the act of *George Spaulding*, in words and

[Allen v. The State.]

figures substantially as follows," setting it out; and the second count, that, with intent to injure or defraud, he "did falsely make or forge an instrument in writing, in words and figures substantially as follows," setting it out, and adding, "meaning thereby that said instrument was an order from George Spaulding, on Tonsmeire & Craft, for groceries." The defendant demurred to each count of the indictment, on these several grounds as specified: 1st, "because said instrument therein set forth, and alleged to be forged, is invalid on its face, creates no liability on any one, has no legal tendency to effect a fraud, and can not be the subject of forgery;" 2d, "because said instrument creates no legal liability against any one whatever;" 3d, "because said indictment charges no criminal offense whatever." The court overruled the demurrer, and the defendant then pleaded not guilty.

In the organization of the petit jury, as the minute-entry recites, "it appearing to the court that, by reason of challenges, the jury is reduced to less than twelve, to-wit, eleven, the court ordered the clerk to draw from the jury-box, in open court, two names from which to complete the jury; and at the suggestion of the defendant by his attorney, and of the solicitor for the State, the court ordered that five names should be drawn in place of two, and in compliance with said order the clerk drew from the box, in open court, the following persons;" and all of these persons being summoned, but a competent juror not being obtained from among them, the court again ordered two talesmen to be summoned, but increased the number to seven, at the instance of the defendant's attorney and the solicitor; and out of these seven persons the jury was completed. On the trial, as appears from the bill of exceptions, the State produced the written instrument alleged to have been forged, and introduced George Spaulding as a witness, who testified, "that he did not write or sign said order, nor was it written or signed by his authority; that he was a steamboat agent, and had been for more than a year, and sometimes made purchases from Tonsmeier & Craft, whom he knew; and that the defendant was working for him at the time said order purports to have been written and signed." The defendant objected to the admission of the order as evidence on this testimony, and excepted to the overruling of his objection. The State then introduced Henry Tonsmeier as a witness, who was a member of the said firm of Tonsmeier & Craft, and who testified, "that the defendant came to their store on Dauphin street, during last April, and asked if they would let him have some groceries, if he would get an order from Mr. George Spaulding; that witness replied, 'Yes, if you will get such order,' or words to that effect; that defendant returned a few days afterwards, with

[Allen v. The State.]

said order, and witness then let him have two or three dollars worth of groceries on said order; that he would not have let defendant have goods, if he had not presented the order; that defendant got goods from them several times subsequent to the presentation of said order; and that he did not know whether the bill had ever been presented to Mr. Spaulding, nor whether it had been paid." On the part of the defendant it was proved that he had paid the account for the goods which he had obtained from said Tonsmeier & Craft; and the receipt was produced, which was dated May 1st, 1883. He also adduced evidence of his good character.

"This being all the evidence, the State requested the court to give the following charges: 1. 'If the evidence shows that a person knowingly and willfully does an act, the probable consequences of which would be to injure or defraud, the jury may infer a fraudulent intent.' 2. 'The jury may infer that the defendant did himself forge the purported order, if they believe from the evidence that he uttered and published it as true, knowing it to have been forged.' The court gave each of said charges, and the defendant then and there excepted to the giving of each of said charges; and the defendant then requested the court to give the following charge: 'The court charges the jury, that Mr. George Spaulding could not have been injured in any way by forging his name to said instrument.' The court refused to give said charge, and the defendant then and there excepted."

The jury returned a verdict of "guilty as charged in the indictment," and the court thereupon sentenced the defendant to hard labor for the county for the term of two years. Before sentence, the defendant moved in arrest of judgment, on account of alleged defects in the indictment, error in the charges of the court, and the insufficiency of the verdict; and an exception was reserved by him to the overruling of this motion.

JEMISON & FERGUSON, for the appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The instrument described in the indictment is one by which a pecuniary demand or obligation purports to be created, and the false making of it, with intent to defraud, is forgery in the second degree.—Code of 1876, § 4340. And the indictment is sufficient.—*Johnson v. The State*, 35 Ala. 370; *Thompson v. The State*, 49 Ala. 16; *Jones v. State*, 50 Ala. 161; *Rembert v. The State*, 53 Ala. 467; *Anderson v. The State*, 65 Ala. 553; *Brown v. The State*, 52 Ala. 345.

It is here objected, that the City Court ordered too many

[McMillan v. Otis.]

additional jurors to be drawn and summoned, to supply the deficiency in the panel of the petit jury. The record shows, affirmatively, that this was done at the express request of the defendant, and that he did not except to the action of the court. If there is any thing in this objection, the defendant has precluded himself from urging it, by himself causing the act to be done which he now seeks to review.—*Leonard v. The State*, 66 Ala. 461; *Shelton v. The State*, 73 Ala. 5.

Each of the affirmative charges given at the instance of the State's solicitor, is free from error. There is no testimony tending to show any custody, or even the existence of the forged order, until it was produced by the defendant, and credit obtained on the strength of it. In this state of the proof, the jury were authorized to infer an intent to defraud, and, if necessary, that the defendant himself forged the paper. *Clark's Manual*, § 1174; *Harrison v. The State*, 36 Ala. 248; *McGuire v. The State*, 37 Ala. 160.

The charge moved for by defendant, is not shown to have been asked in writing. This justified its refusal, whether it asserted a legal truism or not. But the charge was properly refused, even if it had been asked in writing.

There is nothing in the other objections urged. It is not shown that the City Court did not indorse and sign the charges given and refused, as it was its duty to do. We can not presume error. If it was desired to raise this question, there should have been an exception in the court below.—*Tyree v. Parham*, 66 Ala. 424.

Affirmed.

McMillan v. Otis.

Action for Rent, by Assignee of Lease.

1. *Assignment of lease; variance.*—In an action for rent reserved by a written lease, a sole plaintiff suing as the assignee, a recovery can not be had on proof of an assignment to a partnership of which he is a member.

2. *Mortgagee's right to possession, or use and occupation.*—A mortgagee, or trustee in a deed in the nature of a mortgage, is entitled to the immediate possession, and may maintain an action for use and occupation against the tenant in possession, unless the mortgage contains some stipulation, express or implied, postponing his right to take possession; but, where the mortgage contains an express stipulation, that it shall be void, if the secured notes are paid at maturity, and that if the mortgagor "shall fail to pay said notes at their maturity, then it shall be lawful for

[McMillan v. Otis.]

the said M. [mortgagee] to take possession of said lands," his right to take possession is, by clear implication, deferred until the maturity of the notes.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by McMillan & Sons, a partnership suing in their firm name, against William Otis, to recover the sum of \$1,708.30, the rent reserved by a written lease executed by and between J. F. Jewett, as lessor, and said William Otis as lessee, and alleged to be payable, in quarterly installments, between the 1st of June, 1876, and the 1st December, 1877. The action was commenced on the 22d December, 1877. The original lease from Jewett to Otis was dated May 20th, 1859, and was for the term of one year, to commence on June 1st, 1859; but it contained an express stipulation that Otis should have "the privilege of renting said land, mill and improvements, from year to year afterwards, for the space of ten years, at the annual rent of one thousand dollars, payable in quarterly installments as above;" and it was renewed on the 1st June, 1860, for the term of ten years, and again on the 4th March, 1870, for an additional term of ten years; each of these renewals being evidenced by writing indorsed on the back, to which the signatures and seals of both parties were affixed. On the 16th March, 1876, Jewett assigned and transferred the lease, by indorsement under his hand and seal, to E. C. Lyles, who, on the 29th May following, by writing indorsed on it, re-assigned and transferred his interest back to Jewett; and on the same day, May 29th, 1876, by written indorsement, for value received, Jewett transferred all his "right, title and interest in said within lease to M. M. McMillan & Sons," plaintiffs.

On the 12th March, 1872, while Otis was in possession of the premises under the second renewal of his lease, Jewett conveyed the premises by deed of trust to Henry Bernstein, to secure a debt due to Mrs. Caroline Schonfield; and default having been made in the payment of the secured debt, Bernstein sold the property, on April 16th, 1874, under a power contained in the deed, and made a conveyance to S. Vogel as the purchaser. On the 1st May, 1874, Vogel and wife, by quit-claim deed, conveyed the property to said Otis, on the recited consideration of \$5,340 in hand paid; and on the 16th March, 1876, Jewett, having redeemed from Otis, received from him and his wife a quit-claim deed for the premises. On the same day, March 16th, 1876, Jewett conveyed the property, by quit-claim deed, to E. C. Lyles, from whom he had obtained the money to make the redemption; and Lyles, on the 15th April, executed to Otis a lease, or agreement for a lease, in

[McMillan v. Otis.]

these words: "I agree to lease the property to William Otis, for ten years, for \$850 a year, payable quarterly; said Otis to repair the wharf, and keep it in repair during the continuance of the lease, free of expense to me. If J. F. Jewett redeems before 16th March, 1877, then this agreement to be null and void, and of no effect; and if said Jewett does redeem before 16th March, 1877, then said Otis is to be paid for any improvements and repairs on the wharf. William Otis has a right and permission to purchase the property, at any time within three years, for \$6,500, provided J. F. Jewett does not redeem or purchase before 16th March, 1877." On the 20th May, 1876, Lyles and wife, by quit-claim deed, conveyed the property back to Jewett, who had borrowed the money to pay for it from McMillan & Sons, or had procured it on their negotiable promissory notes payable in bank; and to secure the payment of these several notes, which were all dated May 24th, 1876, and payable nine, twelve, fifteen, and eighteen months after date, Jewett conveyed the property, by deed of trust in the nature of a mortgage, to M. M. McMillan, one of the partners of the said firm. This mortgage, or deed of trust, was dated May 24th, 1876, and after reciting said indebtedness, and describing the notes, was conditioned as follows: "Now, if the said J. F. Jewett, his heirs or assigns, shall well and truly pay, or cause to be paid, to said M. M. McMillan the amount of their said notes at maturity, then this deed shall be void, and of no further effect; but, if the said Jewett shall fail to pay to said M. M. McMillan, or his assignee or agent, the amount of the said notes at their maturity, then it shall be lawful for the said M. M. McMillan to take possession of the above described lands and improvements," and sell them after giving notice as prescribed.

The defendant denied his liability to pay the rent sued for, on the ground that the lease became merged in the fee when he obtained a conveyance from Vogel, the purchaser at the sale made by Bernstein as trustee; and this defense was sustained by this court on the former appeal, *STONE, J.*, dissenting. *Otis v. McMillan & Sons*, 70 Ala. 46-62. On the second trial, as the record now shows, the defendant pleaded the general issue, and several pleas which set up the defense of merger in various forms; and issue was joined on these several pleas, after demurrers to the special pleas had been overruled. By leave of the court, and against the objection of the defendant, a count for use and occupation was added to the complaint; and to this count the general issue and the statute of limitations were pleaded, and several special pleas, to which several replications were filed. The opinion of this court renders it unnecessary to state the pleadings at length.

[McMillan v. Otis.]

On the trial, as the bill of exceptions shows, the plaintiffs read in evidence the several conveyances above mentioned, except the deed of trust to McMillan, and then offered in evidence the written lease executed by Jewett to the defendant, "with each indorsement thereon, and assignment thereof; to which the defendant objected, and the court sustained the objection; and plaintiffs thereupon excepted. Plaintiffs then introduced said J. F. Jewett as a witness, who testified, that he owned the said premises at the time he executed the deed to Bernstein as trustee, and the defendant was in possession as his tenant; that he redeemed the premises within two years after the sale by Bernstein, to-wit, on the 16th March, 1876; that he borrowed the money from E. C. Lyles to make such redemption, and paid the same to defendant, said Otis, who had purchased from Vogel; that he afterwards borrowed the money from plaintiffs to repay Lyles, and gave a trust-deed to M. M. McMillan to secure the repayment of the money so borrowed." The plaintiffs then offered said deed to McMillan in evidence; to which the defendant objected, "because it was a deed to McMillan alone, and not to plaintiffs; which objection the court sustained," and plaintiffs excepted. "Plaintiffs then moved to amend, by striking out the firm name of McMillan & Sons, and allowing the case to stand in the individual name of said M. M. McMillan as sole plaintiff;" and this amendment being allowed by the court, the deed to said McMillan was admitted in evidence without objection.

"Said Jewett testified, also, that when he conveyed the premises to said McMillan the defendant was still in possession; that defendant wrote him a note, dated September, 1876, asking when McMillan would be in town, as he wanted to surrender the premises, and did abandon the premises in the latter part of September, 1876, before the law-day of said deed to McMillan, leaving thereon two sticks of live-oak timber, which he removed; at the instance of witness, in June, 1880; that the property was vacant after defendant left it, until June, 1880, when witness took possession of it as the agent of McMillan; that defendant paid no rent to either him or McMillan after the 16th March, 1876, when witness redeemed from him, and always denied his liability for the same. Plaintiff then offered to prove the rental value of the premises at the time said trust-deed was made to him, and up to September 1, 1876; but defendant objected to any proof as to rents between the date and the law-day of said deed, to-wit, between May 24th, 1876, and October 24th, 1877; which objection the court sustained, and plaintiff excepted. Said witness testified, also, that the rental value of the premises, from December, 1877, to June, 1880, was \$1,000 per annum. Plaintiff then offered to prove that,

[McMillan v. Otis.]

at the time defendant entered upon the premises, he did so under the written lease above referred to, and held the premises under said lease as long as he remained in possession thereof. The defendant objected to this parol testimony, and the court sustained the objection; to which the plaintiff excepted. The plaintiff offered no further testimony, and the defendant offered none. The court charged the jury, on the request of the defendant in writing, that they must find for the defendant, if they believed the evidence; to which charge the plaintiff excepted."

The charge given by the court, the rulings on the evidence to which exceptions were reserved, and the several adverse rulings on the pleadings, are now assigned as error.

G. B. & F. B. CLARK, Jr., and H. AUSTILL, for appellant, contended that there was no merger of the lease in the estate acquired by Otis under his deed from Vogel, because of the outstanding statutory right of redemption in Jewett; and that the agreement to accept a new lease was not an extinguishment of the former lease, because it was made conditional on Jewett's failure to redeem. On this point they cited 1 Washburn's Real Property, pp. 52, 62, 65, §§ 76-93; Cooley's Bla. 109, note 9; Bacon's Abr. 102; *Cook v. Parham & Blunt*, 63 Ala. 456; *Southworth v. Scofield*, 51 N. Y. 513; *Humes v. Scruggs*, 64 Ala. 50; Chitty on Contracts, 461. As to the right to recover under the count for use and occupation, they cited *Crommelin v. Theiss*, 31 Ala. 412; *Marx v. Marx*, 51 Ala. 222; *Watford v. Oates*, 57 Ala. 295; *Woodward v. Parsons*, 59 Ala. 625; *Toomer v. Randolph*, 60 Ala. 356.

G. Y. OVERALL, and L. H. FAITH, *contra*, cited, on the question of merger, *Clift v. White*, 15 Barbour, 9; *Reed v. Lotson*, 15 Barbour, 70; *Wilcox v. Davis*, 4 Minn. 197; 2 Ired. N. C. 301; 17 Iowa, 463; 1st Jones on Mortgages, 888. That the deed to McMillan was not admissible as evidence before the amendment of the complaint, they cited *Wharton v. King*, 69 Ala. 365; *Coal Mining Co. v. Brainard*, 35 Ala. 476; *Strickland v. Burns*, 14 Ala. 511; *Ulrick v. Ragan*, 11 Ala. 529. That a recovery could not be had for use and occupation before the law-day of the deed to McMillan.—*Hall v. Railway Co.*, 58 Ala. 10; *Scott v. Ware*, 64 Ala. 174.

SOMERVILLE, J.—This case, when last before this court, on appeal, was under the title of *Otis v. McMillan & Sons*, 70 Ala. 46. The facts are fully stated in the report of the case, and it is unnecessary that they should be again repeated in detail for any purpose of this decision. We are urged by appel-

[McMillan v. Otis.]

lant's counsel to review the doctrine announced in that case, which was decided by a divided court. This is unnecessary, in as much as it is our judgment that the general charge given by the court below, in favor of the defendant, was correct on other and different principles.

If we concede that there was no *merger*, or extinguishment, of the lease made by Jewett to the defendant, Otis, but that it still continued in full force and effect as a lease, with its attendant relationship of landlord and tenant, the evidence shows that this lease was assigned to McMillan & Sons, and not to the plaintiff, M. M. McMillan, alone. The former, in their partnership capacity, were, therefore, the legal owners of the lease, and not the plaintiff. The plaintiff was not the sole landlord of the defendant, entitled as such to the accrued rents, for which the present action is brought; but such rents, if recoverable at all on the strength of the assigned lease, could be sued for only in the name of McMillan & Sons. The variance, therefore, between the *allegata* and *probata*, was fatal to any recovery based on rights derived from the assignment of the written lease.

It is insisted, however, that the plaintiff was entitled to recover for *use and occupation*, because he was the trustee of a deed of trust, in the nature of a mortgage, executed to him by Jewett, in May, 1876, conveying to him the premises in the occupancy of the defendant. This would undoubtedly be true, if the law-day of the mortgage, or trust-deed, had arrived, and the plaintiff, as mortgagee or trustee, was *entitled to possession* during the time when the defendant was in possession and the rents accrued, and, being so entitled, he was active in making claim to the rents, by giving notice to the defendant, as tenant in possession.—*Johnson & Stewart v. Riddle*, 70 Ala. 219; *Marx v. Marx*, 51 Ala. 222; *Knox v. Easton*, 38 Ala. 345.

The rule as to mortgages, in this State, is settled to be, that such a conveyance confers on the mortgagee a title under which he may take immediate possession, *unless there be some stipulation or agreement in the mortgage, express or implied*, postponing the mortgagee's right to take possession until default, or the law-day of the instrument, as it is commonly designated. The decisions are uniform, and without conflict, on this point.—*Watford v. Oates*, 57 Ala. 290; *Woodward v. Parsons*, 59 Ala. 625; *Hutchinson v. Dearing*, 20 Ala. 798; *Toomer v. Randolph*, 60 Ala. 356; *Duval v. McLoskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345.

It is clear to our mind, that the language of the mortgage in question, by clear implication, defers the right of the mortgagee to take possession until the maturity of the mortgage-debt,

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

and that before this day of default he was not entitled to claim the rents.

Affirmed.

Mobile & Spring Hill Railroad Company v. Kennerly.

Action against Tax-Collector, for Money paid as Taxes.

1. *Constitutional inhibition against exemption from taxation.*—The constitution of 1819, which was in force in 1860, contained no limitation or restriction upon the power of the General Assembly, in the imposition of taxes, to make discriminations or exemptions in favor of either individuals or corporations.

2. *Charter of corporation; inviolability as contract.*—The charter of a private corporation, when accepted, is an executed contract between the State and the corporators, and within the protection of the constitutional provision, State and Federal, against laws impairing the obligation of contracts; and it can not be amended or modified without the consent of the corporation, by subsequent legislation, unless the power of amendment is expressly reserved in the charter, or by some existing general law, or constitutional provision.

3. *Exemption from taxation, under charter of corporation.*—When an exemption from taxation, total or partial, is claimed by a private corporation under its charter, or act of incorporation, the courts require that the legislative intent to confer such exemption shall be expressed in clear and unambiguous terms; and if there is a just and reasonable doubt as to such intent, it is resolved against the corporation.

4. *Act incorporating Mobile and Spring Hill Railroad Company; limitation upon municipal taxation.*—Under the act incorporating the Mobile and Spring Hill Railroad Company, approved February 23d, 1860 (Sess. Acts 1859-60, p. 265), while it is declared that, in consideration of the privileges thereby granted, "the property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals, and shall be taxed in no other way," the corporate authorities of the city of Mobile are authorized and empowered "to impose an annual taxation of one dollar on every one hundred dollars of the gross earnings of said company, which said tax," it is declared, "shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages." *Held*, that these provisions indicate a clear legislative intent to exempt the corporation, to the extent specified, from all other municipal taxation than that expressly authorized.

5. *Same; how affected by change of municipality from city to port of Mobile.*—Whatever may be the legal relation existing between the "port of Mobile" and the former "city of Mobile," and the incidents attaching to that relation, the new corporation, like the old, has no power to impose on said railroad corporation any other tax or rate of taxation than that specified in said special charter.

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by the appellant, a domestic corporation, chartered by an act of the General Assembly approved February 23d, 1860, against Lewis H. Kennerly, who was sued "as tax-collector under special act of the General Assembly of Alabama, entitled 'An act for the adjustment and settlement of the debts of the city of Mobile,' approved Dec. 8th, 1880;" and was commenced on March 22d, 1882. The complaint claimed \$98.95, as money had and received, being the amount collected from plaintiff as taxes assessed against it for the year 1881, and alleged to have been paid under protest and by compulsion. The cause was tried on an agreed statement of facts, as follows:

"It is agreed, in this case, that the track of the Mobile and Spring Hill Railroad Company was laid in the year 1860, and that it commenced operations as a railroad during that year, under the charter granted to said company by the act of the General Assembly approved February 23d, 1860; that, subsequent to the grant of said charter, plaintiff obtained the consent of the corporate authorities of the city of Mobile to construct and use its railroad on St. Francis street and the Spring Hill road in said city of Mobile, and from and after the time said railroad was constructed as aforesaid, up to the passage of the act of the General Assembly approved February 11th, 1880, entitled 'An act to vacate and annul the charter and dissolve the corporation of the city of Mobile, and to provide for the application of the assets thereof in discharge of the debts of the said corporation,' the plaintiff paid annually to the mayor, aldermen and common council of the city of Mobile, but quarter-yearly, on the demand of the tax-collector of said corporation, one dollar of every hundred dollars of the gross receipts of plaintiff's said railroad. It is agreed, also, that the General Assembly passed an act approved February 11th, 1879, entitled 'An act to incorporate the port of Mobile, and to provide for the government thereof;' and that the said port of Mobile was organized under and according to said act. It is agreed, also, that from and after the passage of said last-named act, down to and including the year 1881, the plaintiff has annually paid to the corporate authorities of said port of Mobile, quarter-yearly, on the demand and call of the tax-collector of said port of Mobile, one dollar on every hundred dollars of gross earnings of plaintiff's said railroad; that the money herein sued for was claimed by defendant, as tax-collector, for taxes on plaintiff's railroad, equipment, stock, road-bed, and other real and personal property being within the said city of Mobile, for the year 1881, laid and assessed under and in accordance with an act of the

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

General Assembly approved December 8th, 1880, and the act amendatory thereto, for the payment and adjustment of the debts of the city of Mobile, and was paid by plaintiff under protest, and to obtain a release of its property levied on by said defendant as such tax-collector, as appears by the warrant for said taxes and the receipt therefor of said collector, hereto attached and made part of this agreed statement of facts. It is agreed, also, that either party may, on the trial and argument of this cause, use and refer to any act of the General Assembly of Alabama, general or special, or to any ordinance of the city of Mobile, bearing on the matters in issue; and the same shall be considered as a part of this agreed statement of facts, as if herein incorporated by copy. It is further agreed, also, that it be submitted to the judge of the Circuit Court of Mobile county, to determine the law as applicable to these facts—whether said plaintiff is liable to pay said tax, or any part thereof; and if the decision is for plaintiff, judgment shall be rendered against the defendant, for the proper sum, with costs; and if for the defendant, judgment for the costs shall be rendered against the plaintiff.”

On these facts as admitted and agreed on, “the court charged the jury, at the request of the defendant in writing, that they must find for the defendant, if they believed the evidence.” The plaintiff excepted to this charge, and it is now assigned as error.

The 5th section of the plaintiff’s charter, or act of incorporation, which was relied on as a grant of exemption from the tax imposed on it by the corporate authorities of the new municipality called the “Port of Mobile,” contains the following provision: “And for and in consideration of the privileges herein granted by the State of Alabama, the property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals of Alabama, and county and city of Mobile, and shall be taxed in no other way: *provided*, further, that the corporate authorities of the city of Mobile be, and they are hereby, empowered to impose an annual tax of one dollar on every hundred dollars of the gross earnings of said company; to be collected by the tax-collector of said city, whose duty it shall be to demand quarterly of the president, secretary, or other financial officer of said company, statements under oath of the gross earnings of such railway, and at the same time to collect the tax then due thereon; and said tax shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages.”—Sess. Acts 1859–60, p. 265.

The other statutes referred to in the agreed statement of facts, dissolving the charter of the city of Mobile, creating the

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

port of Mobile as a new corporation, and providing for the levy and collection of taxes, may be found in the Session Acts 1878-9, pp. 381, 392; and Session Acts 1880-81, pp. 329, 402.

R. P. DESHON, for appellant.—When the appellant's charter was granted, there was no constitutional provision in force prohibiting or restraining the General Assembly from granting an exemption of the property of a corporation from taxation, or authorizing a fixed payment in commutation of all other taxes. *Daughdrill v. Ala. Life Ins. & Trust Co.*, 31 Ala. 91; *Mayor v. Stonewall Ins. Co.*, 53 Ala. 577. The charter of the company, when accepted, became an executed contract, and could not be annulled or amended by any subsequent legislation, without its consent.—*Salt Co. v. East Saginaw*, 13 Wallace, 373; *Sala v. New Orleans*, 2 Woods, C. C. 188; *Daughdrill v. Ala. Life Ins. & Trust Co.*, 31 Ala. 91; *M. & O. Railroad Co. v. The State*, 29 Ala. 587; *Pearce v. Bank of Mobile*, 33 Ala. 701. The 5th section of the charter, while expressly reserving to the State the right of taxation for its own purposes, imposes a limit upon the power of taxation for municipal purposes; and this limitation can not be abrogated or disregarded, either by the State itself, or by any municipal corporation to whom the power of taxation for local purposes may be delegated. The contract is not between the corporation and the municipality then known as the city of Mobile, but between the corporation and the State; and the State can not delegate to any municipality of its own creation a power which it can not exercise for itself. Nor is an attempt to exercise such power to be implied from the mere change of name and other modifications made in the organization of this particular municipal corporation. As to the construction and validity of exemptions from taxation, see, also, *Hilliard on Taxation*, 357; *Railroad Co. v. Maguire*, 20 Wallace, 365; *Bailey v. Maguire*, 22 Wallace, 220.

J. L. & G. L. SMITH, *contra*.—The proviso to the 5th section of the appellant's charter is not mandatory on the city, but permissive only: the city was thereby authorized and empowered, but was not required, to levy and collect a tax of one per cent. on the gross earnings of the railroad company, instead of exercising its general power of taxation under the 37th section of its charter; and this was in lieu of other taxes, only so long as the city chose to elect to impose it. This gave a mere privilege, and not an absolute right which the appellant could demand.—*Ex parte Banks*, 28 Ala. 28. But, if there was in this proviso any contract at all, it was only during the life of the city of Mobile, and subject to the undoubted right of the State

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

to destroy the corporate existence of the city.—*Merriwether v. Garrett*, 12 Otto, 511; *Mayor v. Stein*, 54 Ala. 27. The power of taxation delegated to the old corporation has ceased with its corporate existence; and the power of the new corporation to levy and collect taxes must be determined by its own act of incorporation. If the language of the appellant's charter, as to this exemption from taxation, were equivocal, the doubt must be resolved against the corporation, and against the restriction of the general power of taxation.—*Delaware Railroad Tax*, 18 Wallace, 206, 227; *Erie Railroad Co. v. Pennsylvania*, 21 Wallace, 499; 10 Penn. St. 450; 54 Ala. 23.

BRICKELL, C. J.—The questions argued by counsel are as follows: 1. What is the nature and character of the fifth section of the act of the General Assembly, approved February 23d, 1860, incorporating the "Mobile & Spring Hill Railroad Company?" is it a contract by which the State stipulated that no other than the taxation prescribed shall be imposed for municipal purposes by the authority of the State? or is it a privilege, or bounty, or exemption, conferred in mere generosity, or to serve a temporary policy, or temporary purposes, which may be withdrawn at the discretion of the legislative power? 2. If it is a contract, is it now obligatory, the municipal corporation known as the "City of Mobile," to which the contract refers, having been dissolved by legislative enactment, and a corporation created, purely municipal, under the name and style of the "Port of Mobile," having substantially the same corporators and the same territorial boundaries?

It may be remarked, that when the act of incorporation became a law, there was no constitutional limitation upon the power of the General Assembly, in the imposition of taxes, to make discriminations or exemptions, relieving the property of individuals or of corporations from the proportion of public burdens to which other property was subject. In this respect, the power of the General Assembly was unlimited, and controlled only by its own considerations of public utility.—*Daughdrill v. Ala. Life Ins. & Trust Co.*, 31 Ala. 91; *Mayor v. Stonewall Ins. Co.*, 53 Ala. 570. Private corporations were generally created by special enactment, and there was no general law, or constitutional provision, to which this special enactment was subordinate, subjecting it to amendment, alteration, or repeal, at the will of the legislature.

A long line of judicial decisions, State and Federal, has settled the doctrine, stated fully and accurately by Mr. Justice Clifford, in *Miller v. State*, 15 Wall. 488, that "corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates; and the

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

grant, under such circumstances, if it be absolute in its terms, and without any condition or reservation importing a different intent, becomes a contract within the protection of that clause of the constitution which ordains that no State shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the State and the corporators; and the rule is well settled, that the legislature, if the charter does not contain any reservation, or other provision, modifying or limiting the nature of the contract, can not repeal, impair or alter such a charter, against the consent, or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, when there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent." The power to alter, amend, or repeal, may be reserved in the act of incorporation; and if so reserved, it qualifies the grant, and the subsequent exercise of the power reserved does not offend the constitutional inhibition of laws impairing the obligation of contracts. Or, if, as is now generally true, by constitutional provision, or by a general law applicable to all acts of incorporation, the State reserves to itself the power to alter, amend, modify, or repeal such acts, there is a qualification of the grant, rendering it subordinate to legislative power to the extent of the reservation.

This doctrine, that the charter of a private corporation granted by the State is a contract between the State and the corporators, inviolable by subsequent legislation, has been of most frequent application, probably, when into the charter is introduced an exemption of the corporation from taxation, or a substitution of a species or mode of taxation intended to be less onerous than that to which individuals are subject, withdrawing the corporation and its affairs, to the extent of the exemption or substitution, from legislative control. When the benefit of such an exemption is claimed, the courts, upon high considerations of public policy, have not sustained it, unless it was conferred in terms clear and unambiguous. If there is just and reasonable doubt whether there is a legislative intent to relinquish the power to tax, wholly or partially, the doubt is solved in favor of the State, and not in favor of the corporation.—Cooley on Taxation, 146; *Providence Bank v. Billings*, 4 Peters, 514; *Wilmington Road v. Reid*, 13 Wall. 264; *City Council v. Shoemaker*, 51 Ala. 114. But, if the intent to relinquish the power is expressed clearly and unambiguously, and the relinquishment is to be taken and deemed as a contract between the State and the corporators, it is the duty of courts to

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

give effect to it, as if it were a contract between private persons, touching their own private interests.

The provision of the act of incorporation now under consideration is in these words: "That the corporate authorities of the city of Mobile be, and they are hereby, empowered to impose an annual tax of one dollar on every hundred dollars of the gross earnings of said company, to be collected by the tax-collector of said city, whose duty it shall be to demand quarterly of the president, secretary, or other financial officer of said company, statements under oath of the gross earnings of such railway, and at the same time to collect the tax then due thereon; and said tax shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages," &c. The clause of the act immediately preceding this provision declares: "The property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals of Alabama, and county and city of Mobile, and shall be taxed in no other way." The words of the statute are clear and unambiguous; the legislative intent expressed by them is not in the least uncertain or doubtful. The property of the company, and the capital actually paid in, are subjected to the same taxation, State and county, and no other, than that which is imposed on the property of individuals. There is a legislative guaranty, that in the imposition of State and county taxes there will be no discrimination against the corporation—that upon it no other than the just proportion of public burdens will be laid; that in this respect it shall stand upon an equality with natural persons. As to municipal taxation, or taxation by the corporate authorities of the city of Mobile, a mode and rate of taxation, with the manner of its collection, is prescribed; and this is declared to be "in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages." There could not have been employed words more clearly indicating the legislative intent to subject the railway of the corporation, its rolling-stock and appendages, to the mode and rate of taxation prescribed, excluding all other municipal taxation.

The purpose of conferring upon the appellant corporate existence and corporate franchises and privileges, was to enable it to construct a railway for the transportation of property and persons. This purpose was so far a public use, that to the corporation was delegated the sovereign power of eminent domain,—the power of taking private property for public uses upon making just compensation. It was, doubtless, in consideration of the purposes for which the corporation was created, purposes not often capable of being accomplished by individual

[Mobile & Spring Hill R. R. Co. v. Kennerly.]

effort, or individual ability, and because every government finds it the better policy to lend all reasonable encouragement to the accomplishment of such purposes, that the legislature deemed it wise to afford the corporation a guaranty against unfavorable discrimination in the imposition upon it of State or county taxation, and to fix with certainty the municipal taxation to which it should be subject, relieving it from all other than that which is fixed and prescribed. The guaranty is as essentially a contract, as is any franchise or privilege granted to the corporation. If it be not—if the corporation is subjected to changing legislation; to discrimination against it in the imposition of State and county taxation, or to municipal taxation varying at the legislative will,—the corporate franchises and privileges, which are matter of contract beyond all dispute, are diminished in value. Public benefit is the object of every grant of corporate privileges; and it is the benefit derived from the corporation, which, in the case of a private corporation, converts the grant into an executed contract, when accepted by the corporators, inviolable by subsequent legislation.—Ang. & Ames Corp. § 13; *Daughdrill v. Ala. Life Ins. & Trust Co.*, 31 Ala. 91; *Home of the Friendless v. Rouse*, 8 Wall. 430.

There are donations or gratuities to individuals, and exemptions or privileges conferred upon corporations, proceeding from motives of mere generosity, or of State policy, of which no service or duty to be rendered, or other remunerative condition, forms a consideration, which may be revoked at the pleasure of the legislature.—Cooley on Taxation, 54. To this class of statutes, denominated *privilegia favorabilia*, belong the statutes which were the subject of consideration in *Dale v. Governor*, 3 Stew. 387; *Christ Church v. County*, 24 How. 300; *East Saginaw Salt Manufacturing Co. v. East Saginaw*, 19 Mich. 259; s. c., reported as *Salt Company v. East Saginaw*, 13 Wall. 373. The distinction between these cases, in which, to use the language of Mr. Justice Campbell, in *Christ Church v. County*, *supra*, “the concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation,” and the case before us, is most manifest. The construction and operation of a railway, in its nature a public highway, the company operating it a common carrier, bound to the transportation of property and persons for a reasonable compensation, thereby promoting public and private convenience, were the benefits to the public, forming a consideration for the act of incorporation, including all its grants of rights and privileges.

It is not necessary now to determine the relation of the “Port of Mobile” to the former corporation of the “City of Mobile;” whether it is a new and distinct corporation, or a

[Young & Co. v. Stoutz & Co.]

mere continuation, under a new name, and the successor of the former municipality, bound by its obligations, and subject to its liabilities. The contract of which the appellant claims the benefit, was not made with the corporation known as the "City of Mobile," but with the State; and it is in restraint of the power of the State to confer or to delegate taxing powers to a municipality contravening its provisions. A municipal corporation has no inherent taxing power; the power it can rightfully exercise, is that which the State may deem it expedient to delegate. When the power is expressly delegated, the corporation can not relinquish it; nor within the delegation is there included any power to discriminate in the imposition of taxation, relieving particular property, or the property of particular persons, natural or artificial, from the burdens it may impose on the property of others of like kind. It may admit of doubt, whether the general statute of December 8, 1880, authorizing the municipal authorities to levy and collect an annual tax of three-fourths of one *per centum* on the value of all the real estate and personal property within the limits of the city of Mobile, was intended to affect or to repeal the special statutory provision incorporated in the charter of the appellant. Special legislation is not, generally, by implication repealed by subsequent general legislation relating to the same subject. However that may be, the charter of the appellant affords it immunity from any other municipal taxation than that which the State stipulated it should bear. The stipulation, it must be observed, relates only to the taxation of the railway, rolling-stock, equipments and appendages. It does not refer to any other species of property within the municipal boundaries, owned by the appellant, the legitimate subject of municipal taxation.

The Circuit Court erred in its rulings; and the judgment must be reversed, and the cause remanded.

Young & Co. v. Stoutz & Co.

Motion for Application of Money in Sheriff's hands.

1. *Mechanic's lien; accrual of, and priority as against attachment.*—A mechanic's statutory lien for labor performed, or materials furnished, accrues from the time at which the labor is done or commenced, or the materials are furnished (Code, §§ 3440–47); and if the claim is properly filed for record within the time prescribed, followed up by suit within ninety days (§ 3454), and prosecuted to judgment without unnecessary

[Young & Co. v. Stoutz & Co.]

delay, the lien is superior to that of an attachment levied on the property subsequent to its accrual, though before the commencement of the suit to enforce it.

2. *Same; when attaching creditor is not made party to suit.*—An attachment having been levied on the property after the accrual of the mechanic's lien, the attaching creditor may be made a party to the statutory action for the enforcement of the lien, and he will then be bound by the judgment rendered in that action; but, if he is not made a party, he is not bound by its recitals as to the time when the lien accrued; and the property being sold under executions on the judgments rendered in both cases, and the money brought into court by the sheriff, the records of the two cases being the only evidence before the court, the money is properly awarded to the plaintiff in the attachment case, whose attachment was levied before the mechanic's claim was filed for record.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This was a contest between A. L. Young & Co. and Stoutz & Co., as to their respective rights to certain moneys in the hands of the sheriff, arising from the sale of certain property, real and personal, under execution against the Mobile Furniture Manufacturing Company, a domestic corporation. Each of the claimants had obtained a judgment against said corporation, and each had an execution in the hands of the sheriff at the time of the sale. The judgment of Young & Co. was rendered on the 25th May, 1883, in a statutory action commenced on the 9th February, 1883, which sought to enforce an alleged mechanic's lien on the property. The judgment in favor of Stoutz & Co. was rendered on the 17th May, 1883, in an action commenced by original attachment, which was levied on the property on the 22d January, 1883. On the hearing of the motion for the application of the money, each party offered in evidence the record of the judgment and proceedings in their own favor; and this being all the evidence adduced, the court awarded the money to Stoutz & Co. Young & Co. excepted to this ruling and judgment, and they here assign the same as error. The opinion states the facts on which each of the claims was founded.

F. G. BROMBERG, for the appellant.—The appellants' claim was filed for record in due time, and being duly prosecuted to judgment, the lien relates back to the time when the materials were furnished and the work done.—*Welch v. Porter*, 63 Ala. 225. The appellees acquired, by the levy of their attachment, only an inchoate lien upon the property, or the interest of the defendant therein, which was subject to the existing lien in favor of the appellants; and this levy was paramount only to subsequent charges and incumbrances.—*Henderson v. Ala. Gold Life Ins. Co.*, 72 Ala. 32; *Griggs v. Banks*, 59 Ala. 311; Phil. Mech. Liens, § 225, 2d ed. As subsequent incumbrancers,

[Young & Co. v. Stoutz & Co.]

it was not necessary that these attaching creditors should be made parties to the action to enforce the lien; to require that they should be, would greatly impair the efficiency and simplicity of the summary remedy given to mechanics. If they are not made parties, they would not be concluded by the judgment, and might impeach the validity or extent of the lien claimed; but this was not here attempted. The law giving such liens is to be construed liberally.—Phil. Mech. Lien, §§ 16, 17. The property sold being subject to the appellant's lien, that lien follows the proceeds of sale, and must be first satisfied.—*Werth v. Werth*, 2 Rawle, 151; *Burt v. Kurtz*, 5 Rawle, 246; *Barnes' appeal*, 46 Penn. St. 350; *Steigelman v. McBride*, 17 Illinois, 300; *Robson's appeal*, 62 Penn. St. 405; *Yeadley v. Flanagan*, 22 *Ib.* 489; Phil. Mech. Lien, §§ 196, 249.

OVERALL & BESTOR, *contra*.—The lien of the attachment dates from the levy of the writ, and overrides the mechanic's lien under a claim filed afterwards; and the subsequent judgment establishing the mechanic's lien will not be allowed to defeat it by legal operation. The doctrine of relation is a legal fiction, which is never indulged when it will work injustice. The appellees might have been made parties to the appellants' statutory action (Code, § 3447), and they would then have been bound by it; but, not having been made parties, they are not concluded by that judgment.—*Crutchfield v. Hudson*, 23 Ala. 400; *McLelland v. Ridgeway*, 12 Ala. 482; Freeman on Judgments, § 154.

STONE, J.—The sheriff of Mobile county sold certain lands, and the machinery erected thereon, as the property of the Mobile Furniture Manufacturing Company. At the time of the sale, he had in his hands two executions against said company; one in favor of Stoutz & Co., for something over nine thousand dollars; the other in favor of Andrew L. Young & Co., for one hundred and sixty-one dollars, and interest and costs. The sum produced by the sheriff's sale was more than enough to pay the smaller execution, but not enough to pay the larger. The sale was in fact made under the execution in favor of Stoutz & Co., and the sheriff so returned.

The claim of Stoutz & Co. was as follows: On the 22d January, 1883, they sued out their original attachment against the Mobile Furniture Manufacturing Company, a private corporation; and on the same day it was levied on the property, real and personal, which was afterwards sold by the sheriff. The proceeds of that sale are the subject of the present contention. On the 17th May, 1883, Stoutz & Co., reduced their claim to judgment; and on the 10th July, 1883, an execution

[Young & Co. v. Stoutz & Co.]

was issued on said judgment, which was received by the sheriff on the same day. Under this execution, he sold the property on the first Monday in September, 1883.

A. L. Young & Co. claimed as follows: On the 26th January, 1883, they filed in the Probate Court of Mobile county their claim, as original contractors, of lien on the said real estate and machinery attached, for alleged materials and repairs furnished and done in and about the machinery on said premises. The charges extend from September 18, to November 27, 1882, and may, in form, be conceded to assert a mechanic's lien, under section 3444 of the Code of 1876. On the 9th day of February, 1883, A. L. Young & Co. instituted their suit against the Mobile Furniture Manufacturing Company, to collect said claim, and to enforce said lien. The complaint is in regular form to accomplish the double purpose. Only the Furniture Manufacturing Company was made defendant to the suit. On the 25th May, 1883, this claim was reduced to judgment final on verdict, and established a lien on the real estate for the amount sued for and recovered. Execution on this judgment was issued, and placed in the hands of the sheriff, on the 2d day of July, 1883. There was indorsed on this execution a notice to the sheriff that said *f. fa.* was "a special lien upon all property of defendant described in the judgment." As we have said, each of these executions was in the hands of the sheriff, when the lands were sold for a sum more than sufficient to pay the alleged mechanic's claim and lien. The sheriff, being notified by A. L. Young & Co. that they claimed the paramount lien, returned the facts to the court, and asked instructions as to the application of the funds. In this, the sheriff acted clearly within the line of his duty, and the Circuit Court acquired jurisdiction of the controversy.—*Campbell v. Spence*, 4 Ala. 543. The Circuit Court adjudged, that Stoutz & Co. had the paramount lien, and that the funds be paid to them, leaving nothing for A. L. Young & Co.

There can be no question, that a mechanic's lien for materials and labor put on stationary machinery, such as is shown in this case, if presented and filed in time, followed up by suit and recovery in time, is superior to that of an attaching creditor, whose attachment is levied subsequent to the accrual of the mechanic's lien; and the lien of the latter accrues from the date the materials are furnished, or the labor done, or commenced.—Code of 1876, §§ 3441-2; *Welch v. Porter*, 63 Ala. 225; *Ex parte Schmidt*, 62 Ala. 252; *Rothe v. Bellingrath*, 71 Ala. 55. This primary or inchoate lien, however, loses all force and vitality, unless it is followed up by a proper filing for record under section 3444 of the Code, and suit brought within ninety days after such filing, and prosecuted without unneces-

[Alabama Gold Life Insurance Co. v. Thomas.]

sary delay to final judgment.—Code of 1876, § 3454. If, on the other hand, these steps be taken as prescribed, then the lien attaches from the time the materials were furnished, or work commenced.—Code, § 3442.

A. L. Young & Co. had it in their power to make Stoutz & Co. parties to the suit they instituted to enforce their lien. Code, § 3447. Had they done so, then a recovery by them, fixing the time when their materials and labor were furnished, at a date anterior to the levy of the attachment, would have conclusively established their right to be first paid out of the proceeds of the sale. They did not make Stoutz & Co. parties, and hence did not, by that suit, establish their paramount claim. A judgment is evidence of the facts it ascertains, only against parties to the record and their privies.—See 1 Greenl. Ev. § 522; Code, § 3447.

On the motion for directions as to the application of the funds, only the records of the two suits were offered in evidence. This, as we have shown, contained on the side of Young & Co. only the statement of the asserted lien, filed in the Probate Court, and the record of recovery against the Furniture Manufacturing Company. Neither of these was evidence against Stoutz & Co. of any thing occurring before the judgment, and not then against liens of older date.—*Walker v. Elledge*, 65 Ala. 51; *Gilbreath v. Jones*, 66 Ala. 129. This case then, as between these parties, stands on the naked facts, that Stoutz & Co. had their attachment levied January 22d, 1883, and followed it up with judgment and execution, under which the property was sold. This gave them a *prima facie* right to the money. As against them, Young & Co. showed no lien until their execution went into the hands of the sheriff, some six months afterwards. In such state of the proof, the Circuit Court was without discretion.

The judgment of the Circuit Court is affirmed.

Alabama Gold Life Insurance Co. v. Thomas.

Action on Policy of Life Insurance.

1. *Forfeiture of policy on non-payment of premiums or interest; indorsement as to paid-up value.*—An indorsement on a policy of life-insurance which states that, “in consideration of the payment on the within policy of four annual premiums, less note for \$169.20, given for balance due on

[Alabama Gold Life Insurance Co. v. Thomas.]

premium loans to November 11th, 1872, said policy is entitled at maturity to a paid-up value of four-tenths of the sum insured, subject to deduction of note above described, interest upon which is payable annually in advance," does not show the entire contract between the parties, but is to be construed in connection with the stipulations contained in the policy itself; and one of these stipulations being that, "in case the assured shall not pay the said premiums at or before the date mentioned for the payment thereof, and the interest annually on all notes or credits on account of premiums, until the same are fully paid up, then this policy shall be void," while another stipulation was that, "when this policy shall cease or become void, all payments made thereon shall be forfeited to said company,"—neither the note nor the interest thereon being paid, the policy is forfeited.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Mrs. Sallie A. Thomas, the widow of Eugene A. Thomas, deceased, against the appellant, a domestic corporation engaged in the business of life-insurance; and was founded on two policies of insurance which said Eugene A. Thomas had effected on his own life, and which were regularly assigned by him to the plaintiff. The policies were dated, respectively, on the 17th February, and the 11th November, 1869, and each was \$5,000; but the plaintiff claimed only \$2,500 on one, and \$2,000 on the other, as the paid-up value of each, evidenced by the defendant's indorsement thereon. The indorsement is copied in the opinion of the court, and the material stipulations contained in the policies are there stated. The defendant insisted that the indorsement was to be construed in connection with the policy itself, as showing the entire contract between the parties; and that the policy was forfeited by the non-payment of both principal and interest on the note described in the indorsement. The court below, in its rulings on the pleadings, construed the indorsement as a new contract; and charged the jury, on all the evidence adduced, there being no conflict, that they must find for the plaintiff, if they believed the evidence, for the paid-up value specified in the indorsement, after deducting the amount due on the note, with interest computed with annual rests. The defendant excepted to this charge, and also to the refusal of a general charge asked in its favor; and these rulings are now assigned as error, together with the rulings on pleadings adverse to the defendant. The assured died on the 24th March, 1880, and the action was commenced on the 11th July, 1882.

OVERALL & BESTOR, for appellant, cited *Patch v. Phoenix Mutual Ins. Co.*, 44 Vermont, 481; *Anderson v. St. Louis Mutual Life Ins. Co.*, 3 Big. Life & Accident Ins. Cases, 527; *Knickerbocker Life Ins. Co. v. Dietz*, 52 Md. 16; *Russum v. St. Louis Mutual Life Ins. Co.*, 5 Big. L. & A. Cases, 243;

[Alabama Gold Life Insurance Co. v. Thomas.]

Knickerbocker Life Ins. Co. v. Harlan, 56 Miss. 512; *Smith v. St. Louis Mutual Life Ins. Co.*, 2 Tenn. Ch. 742; *Baker v. Union Mutual Life Ins. Co.*, 43 N. Y. 283; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 504; *Attorney General v. No. Amer. Ins. Co.*, 82 N. Y. 190.

FAITH & CLOUD, and TOULMIN, TAYLOR & PRINCE, *contra*. The original policies were forfeited by the non-payment of premiums, and ceased to have any value whatever as existing contracts of insurance; but, on their surrender after forfeiture, as therein expressly provided, the assured was entitled to demand a "new policy," for the value acquired by the payments made on the old. These "new policies" were shown by the indorsements made on the old; and they are made certain and definite by the reference to the old policies.—1 Phil. Ins. 8; 5 Ind. 96; 16 Pick. 227; 19 Ala. 377. But the indorsements were not intended to revive the policies as contracts, nor can such operation be given to them. The conditions of the old policies might have been incorporated in the new, but they were not; the only stipulation being that the amount to be paid, as therein stated, was subject to deduction on account of the amount due on the note, with interest thereon, computed annually in advance. This was a fair and valid contract, which the courts will sustain and enforce. No more forfeitures were to be incurred; but, as the assured grew older, the liability of the insurer diminished by the annual interest on the note; and if the assured had lived twenty-five years, the insurer would have owed nothing, the note and accrued interest thereon being equal to the sum insured.—*St. Louis Mutual Life Ins. Co. v. Grigsby*, 4 Big. Ins. Cases, 633; *Ohde v. N. W. Mutual Life Ins. Co.*, 5 Big. Ins. Cases, 145; *Insurance Co. v. Dutcher*, 5 Otto, 269; 14 Bush, Ky. 51; 4 Mo. App. 386; 30 Ohio St. 240; 63 Geo. 199; 82 N. Y. 543; 127 Mass. 153; 58 Ala. 558; 5 Jones, N. C. 558; 39 Wisc. 397. A policy of insurance is to be construed most strongly against the insurer, especially clauses providing for a forfeiture.—39 Wisc. 397; 58 Ala. 476; 101 Mass. 558; 5 Bigelow, 558; 30 Ohio St. 240.

SOMERVILLE, J.—The present action is brought against the appellant insurance company, on two policies of life-insurance, the original amounts of which were severally the sum of five thousand dollars each. These policies were taken out on the life of Eugene A. Thomas, the husband of the plaintiff, and were by him assigned to her in due form, by consent of the company. The assured, upon surrendering the original policies within the prescribed time, after they had ceased in consequence of the non-payment of premiums, procured certain *indorse-*

[Alabama Gold Life Insurance Co. v. Thomas.]

ments in writing upon these policies, entitling the holder, at maturity, to a paid-up value proportioned to the amount of premiums which had been paid.

The whole question involved in this case, in our judgment, is, whether these indorsements are to be construed as separate and independent contracts of insurance, disembarrassed from the conditions of the original policies, or whether the indorsements and policies are to be construed together as constituting but one contract.

The first indorsement made on one of these policies is as follows, being dated at the office of the company, on November 29th, 1873: "\$2,000. In consideration of the payment, on the within policy, of four annual premiums, less note for \$169.20, given for balance due on premium loans to November 11th, 1872, *said policy is entitled, at maturity, to a paid-up value of four-tenths of the sum insured, subject to deduction of note above described, interest upon which is payable annually in advance;*" signed, "T. N. Fowler, secretary."

The indorsement on the other policy is in substance, though not in exact language, the same. The promissory note above alluded to is signed by the assured, and purports to be "for *part premium* due and payable on policy No. 697," being the one on which the indorsement was made. A similar note was given for \$203.84, being for part of the unpaid premium on the other policy, which is described as policy No. 165. The terms and conditions of the policies are precisely the same.

It is admitted that these outstanding notes for unpaid premiums have not been discharged, and that *no interest has ever been paid on them*, either by the plaintiff, or by the assured.

It is insisted that, under the express conditions of the policies, the failure to pay the interest on these notes operated as a forfeiture of the policies, rendering them void. This is claimed by the company, under the provisions of the following clause: "Or, in case the said Eugene A. Thomas *shall not pay* the said premiums, on or before the date mentioned for the payment thereof, and *the interest annually on all notes or credits on account of premiums, until the same are fully paid up, then, and in every such case, this policy shall be void.*" Another clause provides, further, that "in every case where this policy shall cease, or be or become void, all payments made thereon shall be *forfeited* to said company, and also all profits and dividends accruing therefrom."

These clauses are too plain in meaning to admit of much room for construction. They incorporate a clear agreement between the contracting parties, that the policies shall be *void* in the event of a failure on the part of assured, or some one for

[Alabama Gold Life Insurance Co. v. Thomas.]

him, to make punctual payment of either the *premiums*, or of the *interest on all notes given on account of premiums*.

It is too late, at this day, to raise any question as to the legal validity of such a contract. To one who understands anything of the principles upon which the business of life-insurance is conducted, it is obvious that the punctual payment of premiums is of the very essence of the contract. The calculations of insurance actuaries, fixing the rates of insurance, are based upon the theory of prompt payment, so as to afford opportunity for such re-investment as to reap the fruits of compound interest upon the company's moneyed capital. Laxity in the enforcement of punctual payments might, and no doubt would frequently, lead to ultimate, if not speedy financial ruin. Stipulations, therefore, incorporated in insurance-policies, making such payments conditions precedent to the continued liability of the insurer, are generally maintained as valid by the courts. *Patch v. Phoenix Mut. Ins. Co.*, 44 Vt. 481; *Anderson v. St. Louis Mut. Life Ins. Co.*, 5 Big. Life & Accident Rep. 527; *Knickerbocker Life Ins. Co. v. Deitz*, 52 Md. 16; and other cases cited on brief of appellant's counsel.

It is clear to us, that the indorsements upon the policies can not be construed to embody the entire agreement of the contracting parties, freed of the conditions incorporated in the original policies. The indorsements and the policies are to be construed together, as a whole, the policies being continued in force to the extent specified in the indorsements. It is the same as if new policies, with the same conditions, had been re-issued for the reduced amount, with the stipulation that the interest on the deferred premium should be paid annually in advance, subject to the penalties provided in the event of failure.

If we possessed the power to construe away any one of the conditions or stipulations of these policies, upon the theory of natural equity, or of hardship, we could as well do the same with all others. The insured is prohibited, among other things, from residing or travelling within certain degrees of latitude, from engaging in certain extra-hazardous occupations, or taking his life by his own hand, or losing it in violation of law. These are made expressly conditions precedent to recovery from the insurers, or of their continued liability. It can not be supposed that these conditions have been expunged by omitting to repeat them in the indorsement. The policy, with all its terms, is evidently kept in force, and no sufficient reason exists why one of these conditions should be omitted rather than another, or that the courts should enforce some, and relax the operation of others. The assured may have made a hard or imprudent contract, in agreeing to forfeit these policies upon his failure to

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

promptly pay the interest on these notes annually in advance. But courts have no power to substitute wise for unwise agreements, nor to revise contracts so as to eliminate their hardship through the process of judicial construction. They can only interpret the contracts of parties as they have made them, and enforce them according to obvious intention legally expressed, so long, at least, as they offend no law, or violate no principle of public policy.

It is manifest that the rulings of the Circuit Court are entirely opposed to these views. The general charge requested by appellant should have been given, instructing the jury, if they believed the evidence, to find a verdict for the defendant.

Reversed and remanded.

Dauphin & LaFayette Streets Railway Co. v. Kennerly.

Action against Tax-Collector, for Money paid as Taxes.

1. *Statutory exemptions from taxation*.—When a claim of exemption from taxation, total or partial, is asserted by a corporation or an individual, the legislative intent must be expressed in clear and unambiguous terms, and can not be inferred from language of doubtful import; the rule of construction, in reference to such statutes, requiring that "the narrowest meaning is to be taken which will fairly carry out the intent of the legislature."

2. *Powers of corporations*.—A corporation takes nothing by its charter, except what is plainly, expressly, and unequivocally granted, or necessarily implied; and in all things else the powers which the State may exercise over its affairs are as full and ample as over individuals carrying on the same business.

3. *Proviso to statute*.—The appropriate office of a proviso to a statute is to modify or limit the enacting clause, or to except something which would otherwise be included in it; and when annexed to a statute granting powers to a corporation, it will not be construed to enlarge those powers, or to operate as a grant of other privileges.

4. *Commuation tax on railroads in Mobile; not applicable to corporation constructing road under special charter*.—By an act approved February 4th, 1860, the corporate authorities of the city of Mobile were authorized to grant to any person, association or company, the right and privilege of constructing a railroad along and through any streets in the city, for a period not longer than twenty years, and to prescribe the kind of rail to be used, the width and length of the track, the location of turn-outs, &c.; and they were authorized to impose and collect, "from each company, person or association erecting any railway under the authority of this act," a tax of one dollar on every hundred dollars of the gross earnings of such railway company, which tax, it was declared, "shall be in lieu and in full of all taxes and impositions of any nature in favor of said city of Mobile, upon such railway, equipments, stock and append-

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

ages." The appellant corporation, chartered in 1858, under the name of the "Mobile Omnibus Company," was authorized by an act amending its charter, approved February 24th, 1860, "upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway or railways on any street or streets in said city; *provided*, however, that all restrictions, limitations and conditions prescribed in the act" above named, approved February 4th, 1860, "shall apply to said company, should it obtain the privilege from said city authorities to construct and use such railroad." *Held*, that the provision in reference to the special tax authorized by said act of February 4th, 1860, was not one of the "restrictions, limitations and conditions" referred to in the proviso; and that said corporation, having obtained the consent of the city authorities, and constructed its railroad through the streets of the city, could not claim the benefit of said provision, and was subject to other taxation.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by the appellant, a domestic corporation, against Lewis H. Kennerly, "as tax-collector under special act of the General Assembly of Alabama approved December 8th, 1880, entitled 'An act for the adjustment and settlement of the debts of the city of Mobile;'" and was commenced on the 8th February, 1882. The complaint contained a special count for money had and received, claiming \$168.78, which was alleged to have been wrongfully and illegally exacted and collected by defendant under color of his office as tax-collector, and to have been paid by plaintiff under protest and compulsion. The facts of the case, as agreed on and reduced to writing, were as follows:

"It is agreed that the track of the plaintiff's railway was laid in the summer and fall of 1860, and that it commenced operations as a street railroad on the 25th December, 1860, under the original charter name of the Mobile Omnibus Company, passed by the General Assembly on the 26th January, 1858, and afterwards amended by an act approved February 24th, 1860; and that plaintiff, subsequently to the passage of said amendatory act, obtained the consent of the corporate authorities of the city of Mobile to construct and use a street or horse railway, on Dauphin street in said city, for the transportation of passengers and merchandise; and that from and after said railway was constructed as aforesaid, up to the passage of the act of the General Assembly approved February 11th, 1879, entitled 'An act to vacate and annul the charter and dissolve the corporation of the city of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation,' plaintiff paid annually to the mayor, aldermen and common council of the city of Mobile, but quarterly, on the call and demand of the tax-collector of said corporation, one dollar of every hundred dollars of the gross

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

earnings of said railway company, under the provisions of an act of the General Assembly of Alabama, approved February 4th, 1860, entitled 'An act to enable the corporate authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of said city.'

"It is further agreed, also, that the General Assembly of Alabama passed an act, entitled 'An act to incorporate the port of Mobile, and to provide for the government thereof,' approved February 11th, 1879; and that said port of Mobile was organized under and according to said act; and that from and after the passage of said last named act, down to and including the year 1881, plaintiff has annually paid to the corporate authorities of said port of Mobile, in quarter-yearly installments, on the call and demand of the tax-collector of said port, one dollar of every hundred dollars of the gross earnings of said railway company, claimed as its municipal tax as provided by said act of February 4th, 1860; and that the money herein sued for was claimed by defendant, as tax-collector, for taxes on plaintiff's railway, equipments, live-stock, rolling-stock, and road-bed, being within said city and port, for the year 1881, laid and assessed under and in accordance with an act of the General Assembly of Alabama, approved December 8th, 1880, and the act amendatory thereof, for the adjustment and settlement of the debts of the city of Mobile, and was paid by plaintiff under protest, and to obtain a release of its property levied on by defendant as such tax-collector, as shown by his receipt hereto attached as a part of this agreed statement of facts.

"It is agreed, also, that on the trial and argument of this case, either party may use and refer to any act of the General Assembly of Alabama, general or special, or any ordinance of the city of Mobile, bearing on the matters in issue; and the same shall be considered as a part of this agreed statement of facts, as if herein incorporated by copy. It is further agreed, that it be submitted to the judge of the Circuit Court of Mobile county to determine the law applicable to these facts—whether said plaintiff is liable to pay said tax, or any part thereof; and if the decision is for plaintiff, judgment shall be rendered against defendant, for the proper sum, and costs; and if for defendant, judgment for costs shall be rendered against plaintiff. From such judgment, either party may appeal to the Supreme Court."

This being all the evidence, as the bill of exceptions states, "the court charged the jury, on the request of the defendant in writing, that they must find for the defendant, if they believed the evidence;" and this charge, to which the plaintiff excepted, is now assigned as error.

The said act of February 4th, 1860, "to enable the corporate

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of said city," contains five sections. The first section authorizes the corporate authorities of the city "to grant to any person or persons, or association of persons, company or companies, the right and privilege of building and constructing, on and along any street or streets, or upon any land belonging to said city, and upon such terms and conditions as said authorities may think proper and prescribe, a railway or railroad for the conveyance and transportation of passengers and merchandise in cars or carriages to be run and drawn thereon;" with a proviso that only draught animals should be used in certain portions of the city, and another limiting the grant to any company to a period of twenty years, and authorizing the city to take possession of the property at the expiration of that term, on paying the reasonable value thereof. The second section provides that "all railways, and a space of three feet on each side of the track of every railroad constructed in the city of Mobile, shall always be kept shelled, paved or planked, at the expense of the company," &c.; and authorizes the imposition of a fine for its violation. The third section gives the corporate authorities of the city "power to prescribe the width of each and every track of railway to be constructed, and in what part of the street the same shall be placed, and where and in what places turn-outs and sidings may be placed, and to prescribe the form of rail to be used, and, generally, to impose such terms and conditions as may be necessary to secure said tracks conforming to the grade of the streets and the drainage of said city, and offering as little obstruction as practicable to the passage of ordinary carriages and other vehicles." The fourth section declares, "that the said corporate authorities of Mobile may impose and collect, as a tax, from each person, company or association, erecting any railway under the authority of this act, at the rate of one dollar on every hundred dollars of the gross earnings of such railway company; and for the purpose of collecting the said tax, it shall be the duty of the tax-collector of said city, quarterly, to call and demand of the president, secretary, or the financial officers of said railway company, or proprietors, statement under oath of the gross earnings of said railway company, and at the same time collect the amount so found to be due, as the tax aforesaid; and the tax hereby authorized to be imposed and collected shall be in lieu and in full of all taxes and impositions of any nature, in favor of said city of Mobile, upon such railway, equipments, stock and appendages." The fifth section requires the articles of association to be filed in the office of the probate judge of Mobile, and confers upon the companies when organized the powers to purchase and hold

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

property, sue and be sued by their corporate names, and to enact by-laws and regulations not inconsistent with the laws of the State or the ordinances of the city of Mobile.—Sess. Acts 1859–60, pp. 261–63.

The Mobile Omnibus Company was incorporated under an act of the General Assembly approved January 26th, 1858, which gave the company power to hold property, to sue and be sued by their corporate name, to enact by-laws not inconsistent with the laws of the State, and to engage in the transportation of persons for hire, in carriages and omnibuses, any where within the corporate limits of Mobile.—Sess. Acts 1857–8, pp. 125–6. By an act approved February 24th, 1860, the charter of this company was amended by giving it power to increase the capital stock to \$100,000; and the second section of the amendatory act further provided: "That said omnibus company, in addition to the powers heretofore granted under the act of incorporation, shall have power, upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway or railways, on street or streets in said city, for the transportation of passengers and merchandise; *provided*, however, that all the restrictions, limitations and conditions prescribed in an act passed by the present General Assembly, to enable the corporate authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of said city, shall apply to said omnibus company, should it obtain the privilege from said city authorities to construct and use such railroad."—Sess. Acts 1859–60, p. 493.

OVERALL & BESTOR, for appellant.

J. L. & G. L. SMITH, *contra*.

BRICKELL, C. J.—There are several questions to which the argument of counsel has been directed, we do not deem it necessary or proper now to consider. The first is, whether the fourth section of the act of the General Assembly approved February 4th, 1860, entitled "An act to enable the corporate authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of said city" (Pamph. Acts 1859–60, p. 262), imposing a specific tax upon the gross earnings of such railways, "in lieu and in full of all taxes and impositions of any nature, in favor of said city, upon such railway, equipments, stock and appendages," is to be regarded as a contract inviolable by subsequent legislation, or as merely offering a bounty, which can be withdrawn at legislative discretion. The second is, whether the "Port of Mobile," as

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

incorporated under the act of the General Assembly approved February 11th, 1879 (Pamph. Acts 1878-9, p. 392), is a new and distinct municipal corporation, or but the successor of the former corporation, known as the "City of Mobile." These questions can not arise, and become the legitimate subject of judicial consideration and decision, unless it be shown that from the act referred to authority to construct a railway was derived, or that to the company constructing a railway the benefit or right to the statutory rate of taxation has been extended, and that to other municipal taxation it is proposed to subject it.

Originally, the appellant was incorporated by a special act of the General Assembly, under the name and style of the "Mobile Omnibus Company," for the purpose of transporting for hire persons to and from points in the corporate limits of the city of Mobile, in carriages, vehicles, and omnibuses drawn by animals.—Pamph. Acts 1857-8, p. 115. Subsequently, by an act approved February 24th, 1860, the act of incorporation was amended; and the second section of the amendatory act reads: "That said omnibus company, in addition to the powers heretofore granted under the act of incorporation, shall have power, upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway or railways, on street or streets in said city, for the transportation of passengers and merchandise; *Provided*, however, that all the restrictions, limitations and conditions prescribed in an act passed by the present General Assembly, to enable the corporate authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of said city, shall apply to said omnibus company, should it obtain from said city authorities the privilege to construct and use such railroad." Pamph. Acts 1859-60, p. 493.

The argument for the appellant is, that the operation and effect of the proviso above recited is to incorporate, as part of its charter, the fourth section of the act to which the proviso refers, thereby relieving it from all other municipal taxation than one per-centum of its gross earnings. It is an undoubted proposition, that the burden of taxation, whether it be State or municipal, ought to fall equally upon all persons, natural or artificial, who may be subject to it. "Taxation is the rule; exemption the exception."—Cooley on Taxation, 146. When, therefore, it is claimed that by legislation any species of property, whether it be the property of natural persons, or of corporations created for individual profit, is relieved from its just proportion of public burdens, the intention to release it ought to be expressed in clear and unambiguous terms: it ought not to be deduced from language of doubtful import, nor when

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

there is room for just controversy as to the legislative intent. Cooley on Taxation, 146; Burroughs on Taxation, 132; *Stein v. Mobile*, 17 Ala. 234; *Delaware Railroad Tax*, 18 Wall. 207; *Erie Railway Co. v. Pennsylvania*, 13 Wall. 492; *Bailey v. Maguire*, 22 Wall. 215. And it can not be of importance in the application of this principle, that the exemption claimed is not total and absolute—that it is partial and qualified, assuming the form of a commutation, or the substitution of a burden less onerous than that which is imposed on the property of others of like kind. An absolute, unqualified exemption, and a partial exemption, a commutation, differ in degree, not in character. A statute creating an exemption from taxation, or substituting, for the benefit of an individual or a corporation, taxation less onerous than that which others must bear, “belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature.”—*Christ Church v. Philadelphia*, 24 How. 302. There is, also, another principle well settled, “that a corporation takes nothing by its charter, except what is plainly, expressly, and unequivocally granted, or necessarily implied, and that in all things else the powers which the State may exercise over its affairs are as full and ample as if it were an individual carrying on the same business.”—*Bank of Pennsylvania v. Commonwealth*, 19 Penn. St. 155. When these principles are applied to the case before us, the argument of the appellant can not be supported.

The appellant derives corporate existence, and power and authority to construct a railway upon the streets of the city, from its own charter and the act amendatory thereof. It takes no right, franchise or privilege, from the general statute enabling the corporate authorities of the city to grant the privilege of constructing railways on the streets, or on any land belonging to the city. The power could not be exercised, until the consent of the corporate authorities was obtained. Obtaining the consent, was a condition precedent to the exercise of the power engrafted upon the grant. The power is, nevertheless, a franchise derived from the charter, and not from the corporate authorities when yielding consent to its exercise. The statutory exemption from municipal taxation, or commutation, is, by its terms, limited and confined to “each company, person or association,” constructing a railway under the authority of the statute in which it is found. The reason for a distinction between those constructing a railway under the authority of the general statute, and a corporation constructing a like railway under a separate, independent, distinct grant proceeding directly from the legislative power, may not be obvious; nor is it within our province to inquire whether a good reason for it can be assigned. The words of the statute are clear and un-

[Dauphin & LaFayette Streets Railway Co. v. Kennerly.]

ambiguous, leaving no room for a construction by which any other than the class designated can be entitled to the exemption from a just proportion of governmental burdens, which it is supposed they create.

The intent to extend the exemption to the appellant can not be deduced from the proviso to the second section of its amended charter. There are no words in it capable of being construed as a grant of either privileges or powers. When read in connection with the clause immediately preceding it, so far from adding to, or enlarging the general grant of power to the appellant, it will be seen it performs the office a proviso to a statute is generally intended to perform. "The proviso," said C. J. Marshall, "is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some manner, to modify the enacting clause." It is here a limitation or exception to a grant made,—to authority conferred.—*Rawls v. Kennedy*, 23 Ala. 240; *Wayman v. Southard*, 10 Wheat. 1. It subjects the franchise conferred upon the appellant to *restrictions, limitations, and conditions*; and for them refers to the general statute enacted at the same session of the General Assembly, enabling the corporate authorities of the city of Mobile to grant the privilege of constructing railroads within the corporate limits of the city. The extent to which the general grant of power and franchise is thereby limited and restrained is apparent upon an examination of the statute to which reference is made. The grant can not endure for a longer period than twenty years, and upon the expiration of that period the corporate authorities are clothed with power to take the railway, its rolling-stock, equipments and appendages, upon paying the reasonable value thereof. The use of any other motive power than that of draught animals is prohibited within certain localities. The manner of constructing the railway, the condition in which it is to be kept, and the penalty incurred if it is not constructed and kept as required, are prescribed. Power is reserved to the corporate authorities to prescribe the width of the track, the part of the street on which it is to be located, and the form of the rail to be used; to determine the places at which turn-outs and sidings may be constructed, "and, generally, to impose such terms and conditions as may be necessary to secure the said tracks conforming to the grade of the streets and the drainage of the city," &c. These are the *restrictions, limitations and conditions*, to which the general grant of power to the appellant to construct and use a railway is subjected; and subjection to them is the purpose of the proviso, qualifying and modifying the general grant. The words of the proviso are not capable of a just construction which will extend them beyond these

VOL. LXXIV.

[Werborn v. Pinney.]

restrictions, limitations and conditions, converting them, from words qualifying the general words which precede, into an independent grant of privilege. We are, therefore, of opinion that the appellant is not entitled to the exemption claimed, and that its property and rights of property are as subject to municipal taxation, as fully and amply, as may be the property and rights of property of individuals.

The result is, the judgment of the Circuit Court must be affirmed.

Werborn v. Pinney.

Motion to Quash Execution on Probate Decree.

1. *Quashing execution; what grounds are available.*—On motion to quash or supersede an execution, which follows a judgment or decree regular on its face, only facts which have occurred since the rendition of the judgment or decree are available, or antecedent facts which show fraud in it, or a want of jurisdiction apparent on the record.

2. *Same; conclusiveness of probate decree.*—A decree being rendered against an executor, on final settlement of his accounts, and affirmed by this court on appeal, an execution issued on such decree can not be quashed or superseded, on the ground that the court had no jurisdiction of the settlement, because the will, of record in that court by probate, involved trusts which were cognizable exclusively in a court of equity.

3. *Decree in favor of married woman; presumption in favor of regularity.*—The rendition of a decree, on final settlement of an executor's accounts, in favor of a married woman alone, not joining her husband, is only an irregularity, available on error; and when the question is raised collaterally, as on motion to quash an execution issued on the decree, possibly the court would presume, in order to sustain the decree, that she had been made a free-dealer.

APPEAL from the Probate Court of Mobile.

Heard before the Hon. PRICE WILLIAMS, Jr.

This appeal was taken from a decree and judgment of said Probate Court, overruling and refusing a motion to quash an execution. The execution was issued on the 26th February, 1883, on a decree rendered by said court on the 11th July, 1881, in favor of Mrs. Amanda M. Pinney, who was the widow of A. M. Solomon, deceased, against George F. Werborn, on final settlement of his accounts as executor of the last will and testament of said Solomon; which decree was affirmed by this court on appeal, at the last term.—*Pinney v. Werborn*, 72 Ala. 58. The executor reserved exceptions to the overruling of his motion to quash the execution, and to the exclusion of the evi-

[Werborn v. Pinney.]

dence offered in support of his motion; and these rulings are now assigned as error.

F. G. BROMBERG, for appellant.—(1.) The will of the testator was matter of record in said court, and the court was bound to look at it in all proceedings relating to his estate. *Mosely v. Tuthill*, 45 Ala. 653. This will created personal trusts, which could not be settled in the Probate Court.—*Perkins v. Lewis*, 41 Ala. 666; *Ex parte Dickson*, 64 Ala. 192; *Mitchell v. Spence*, 62 Ala. 453. The will was so construed by this court, on the former appeal between these parties.—*Pinney v. Werborn*, 72 Ala. 58. The will itself, and the opinion of this court construing it, showed that the decree was void for want of jurisdiction; and the court erred in excluding this evidence. (2.) The decree shows on its face that Mrs. Pinney, in whose favor it was rendered, is a married woman; and her husband was a necessary party to the proceedings.—*Smith v. Hooper*, 20 Ala. 245; *Kavanaugh v. Thompson*, 16 Ala. 817; *Laird v. Reese*, 43 Ala. 148; *Evans v. English*, 61 Ala. 416; *Still v. Ruby*, 35 Penn. St. 373. (3.) The executor might have moved the court to vacate so much of the decree as was void for excess of jurisdiction, if he had been notified of the application for an execution; but, having had no notice, his only remedy was a motion to quash.—*Johnson v. Johnson*, 40 Ala. 247; *Summersett v. Summersett*, 40 Ala. 596.

D. H. LAY, and L. H. FAITH, *contra*, cited *Mervine v. Parker*, 18 Ala. 241; *Matthews v. Robinson*, 20 Ala. 130; *Marshall v. Candler*, 21 Ala. 490; *Gravett v. Malone*, 54 Ala. 19; *Powell v. Boon & Booth*, 43 Ala. 459.

STONE, J.—In July, 1881, George F. Werborn, as executor, came to a final settlement of the estate of Adolph Solomon, deceased, in the Probate Court of Mobile. On that final settlement, a money decree for some two hundred and three dollars was rendered against him, in favor of Mrs. Pinney, the surviving widow of the said Adolph Solomon. Mrs. Pinney appealed from said decree to this court, and the decree of the Probate Court was in all things affirmed.—*Pinney v. Werborn*, 72 Ala. 58. An execution was thereupon issued from the Probate Court of Mobile, to enforce the collection of said money decree, so affirmed in this court. Werborn then moved the Probate Court to quash said execution, on the alleged ground that it "was issued in excess of the powers of this [Probate] court, and in exercise of powers over a subject-matter not confided to this [Probate] court by the laws of Ala-

[Werborn v. Pinney.]

bama." The Probate Court overruled the motion to quash, and Werborn appealed to this court from that ruling.

The attempt was made in the Probate Court to show, by proof *aliunde*, that that court was without jurisdiction to render the decree, for the enforcement of which the execution had been sued out. It was not disputed that the execution pursued the decree, and it was not contended the decree had been obtained by fraud. The precise shape the contention took was, that, under the provisions of Mr. Solomon's will, limitations were imposed and trusts created, which ousted the jurisdiction of the Probate Court; and the court being without jurisdiction, the decree was void; and this was attempted to be shown by the introduction of the will, and other evidence *dehors* the record. All this came too late. It was an attempt, on *supersedeas*, to go behind the judgment, and to re-try questions which should have been brought up on the trial. On *supersedeas* of an execution, which follows a judgment regular on its face, the relief, to be available, must rest on facts occurring subsequent to the decree; or, if it relate to antecedent facts, must show fraud in the decree, or a want of jurisdiction in the court, *apparent on the record*.—*Gravett v. Malone*, 54 Ala. 19; *Mervine v. Parker*, 18 Ala. 241; *Matthews v. Robinson*, 20 Ala. 130; *Marshall v. Candler*, 21 Ala. 490.

The Probate Court is expressly and generally clothed with power and authority over the final settlements of executors and administrators; and the cases in which they have not such jurisdiction are exceptional, growing out of special trusts or equities shown, for which their powers are not plastic enough. These, when shown, deprive the court of jurisdiction. But they must be shown before final decree; and, to open the question for inquiry afterwards, the record must affirmatively show the existence of such exceptional facts. If parties proceed to final settlement and decree in disregard of them, and the court enters an ordinary decree—such as is common in final settlements—we are bound to presume, in favor of regularity, that no valid objection to the jurisdiction existed. And this presumption would be strengthened, if it were possible to make it stronger, by the fact that such decree was procured to be affirmed in a revising court, without objection on the score of jurisdiction.

It is objected further, that the probate decree was improperly rendered in favor of Mrs. Pinney, a married woman, instead of her husband and trustee for her use. We need not consider whether there is any thing in this objection. This, too, comes too late. If well taken, it is only matter of irregularity, which could be considered on error. Possibly, when the question is raised collaterally, as here, it would be our duty to

[Sims v. Eslava.]

presume she had been made a free-dealer, to sustain the decree of the primary court. But, this alleged error was not even raised in the court below, as a ground for quashing the execution. We can only review the questions there raised and passed on, unless the proceedings were void on their face.

The judgment of the Probate Court is affirmed.

Sims v. Eslava.

Statutory Real Action in nature of Ejectment.

1. *Sale of lands under execution, after death of defendant.*—A sale of lands under execution, or other legal process, issued after the death of the defendant in the writ, is a nullity, and passes no title to the purchaser, unless, as authorized by statute (Code, § 3213), a lien was acquired and kept alive during his life, without the lapse of an entire term.

2. *Claim of exemption to property levied on, and contest thereof; effect on lien of execution.*—When a claim of exemption is interposed to property on which an execution has been levied, and the claim is contested by the plaintiff, the lien of the execution, by express statutory provision (Code, § 2835), is neither destroyed nor impaired “by the pendency of such contest, nor by its termination, if found in favor of the plaintiff;” but a termination and abatement of the contest by the death of the claimant is not within the terms of the statute.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by George N. Stewart in his lifetime, and revived, on his death, in the name of the appellant as the executrix of his last will and testament, against Odyle Eslava, to recover the possession of a certain tract of land, which was described as “all of square numbered nineteen (19) according to a map of Spring Hill in said county;” and was commenced on the 30th May, 1882. There was an admission of possession by defendant, in these words: “Defendant admits that Mrs. Celestine Eslava went into possession of the lot sued for, under the deed of B. F. Marshall and wife to her, and resided on said lot up to the time of her death; but this defendant also resided there during the same time.” The plaintiff claimed the land as the purchaser at sheriff’s sale under execution against Mrs. Celestine Eslava, and adduced on the trial, as the bill of exceptions shows, the following evidence in support of his title:

“(1.) A deed from B. F. Marshall and wife to Celestine Eslava, executed January 10th, 1863. (2.) Agreement of

[Sims v. Eslava.]

counsel as to possession," being the agreement above set out. "(3.) Record and proceedings of a certain cause lately pending in this court, wherein Charles Farley was plaintiff, and said Eslava was defendant; wherein said defendant was duly served, and appeared by counsel; and wherein a judgment for \$486, with costs, was duly entered and rendered in favor of said Farley, and against said Celestine Eslava, on the 9th June, 1873. (4.) The records of said court, showing that an execution was issued on said judgment within a year from its rendition, and was duly returned 'No property found;' and that other executions were thereafter issued, and returned 'No property,' continuously and without the lapse of an entire term, down to an execution issued on the 11th December, 1882, which was levied upon all the right, title and interest of said Celestine Eslava in and to the land described in the complaint," with the sheriff's return showing the levy and a claim of homestead exemption interposed by said defendant. (This claim of exemption was verified by affidavit, and the sheriff's return stated that it was filed with him, that he had given notice of the claim to the plaintiff's attorney, and that he had postponed the sale until the further orders of the court.) "(5.) The contest, record and proceedings in said court, had and taken on the return of said execution, between said Farley and Celestine Eslava, upon the contest of the claim of homestead exemption shown in and by said return; the appearance of the parties; the contest; the several orders of the court therein, regularly continuing said cause, from term to term, until the Fall term, 1880, of said court, when an entry was made in said cause, on the 11th January, 1881, suggesting the death of said Celestine Eslava; and that thereafter no further entry appears on the minutes of the court in said cause. (6.) Plaintiff then proved that said Celestine Eslava died on the 21st December, 1880, and that she left no minor child. (7.) Plaintiff then offered in evidence a *renditioni exponas*, issued out of said court on the 22d January, 1881, with the indorsement and sheriff's return thereon;" which showed that the sheriff sold the premises now sued for, under said writ of *renditioni exponas*, on the 1st Monday in March, 1881, and that said George N. Stewart became the purchaser at the sale. And plaintiff then offered in evidence the record of an order made by said court on the 28th January, 1882, on the motion of said Stewart, directing the sheriff to execute a conveyance to him as the purchaser at the sale; and the sheriff's deed, dated April 24th, 1882, which was executed pursuant to this order, and which recited the facts as to the judgment, the issue and levy of the execution, the postponement of the sale in consequence of the claim of exemption, the issue of the *renditioni exponas*, the sale under it, the pur-

[Sims v. Eslava.]

chase by Stewart, and the order of court requiring a conveyance to be executed to him as the purchaser, all as above stated.

"To the admission of said *venditioni exponas*, and of said sheriff's deed, each, as they were offered in evidence, the defendant objected, on the ground that the same was illegal, incompetent, and irrelevant; because the record introduced showed that, at the time of the issue of said writ, the contest of exemption had not terminated by a judgment in favor of plaintiff; and because, if Mrs. Eslava was dead, and the contest had abated on account of her death, then the clerk had no authority to issue said writ; and because the record showed that the lien of said execution, issued on the 11th December, 1878, was discharged by operation of law, before said writ of *venditioni exponas* was issued. The court sustained said objections, both as to said writ and said deed, and excluded the same from the jury; to which ruling and action of the court, as to each, the plaintiff duly excepted," and was thereby compelled to take a nonsuit.

The rulings of the court excluding this evidence, when offered as above stated, are now assigned as error.

PILLANS, TORREY & HANAW, and H. AUSTILL, for appellant. The lien of the execution dated from its levy, and continued up to the moment of the defendant's death. Until the termination of the contest, the property was in the custody of the law, and the sheriff could not discharge it before that contest was ended. If the contest had been tried, and decided against the defendant, thereby establishing the fact that there was no valid claim of exemption to interfere with the execution, it can not be doubted that the plaintiff might at once have had the property sold under a *venditioni exponas*. But the claim and right of exemption, under the facts proved, ceased at once and forever when the defendant died; and the lien, which had only been suspended by the contest, at once revived in full force, and might be enforced as in any other case where the execution of process has not been completed by a sale.—*Dryer v. Graham*, 58 Ala. 623; *Jones v. Key*, 50 Ala. 599; *Thompson v. The State*, 20 Ala. 54; *Taylor v. Miller*, 13 Howard, 293; *Clark v. Kirksey*, 54 Ala. 219.

S. P. GAILLARD, L. H. FAITH, and J. L. & G. L. SMITH, *contra*.—A sale of lands under legal process, after the death of the owner, without a revivor against his heirs, is strictly statutory.—47 Ala. 264; 55 Ala. 601. In this case, the levy was made more than two years before the defendant's death; and it was not kept alive, as it might have been, by the issue of other writs without the lapse of a term.—Code, § 3213; 47

[Sims v. Eslava.]

Ala. 264; 11 Ala. 433; 4 St. & P. 237. As the contested claim of exemption was abated by the death of the defendant, the contest was not decided in favor of the plaintiff, and therefore the case is not brought within the statute.—Code, § 2835. On principles of common law, the plaintiff's *laches* in prosecuting his contest was fatal to his lien.—70 Ala. 409; 74 Ill. 209; 2 Bush, Ky. 236; 6 B. Mon. 491; 14 Ohio St. 18; Freeman on Executions, 206.

BRICKELL, C. J.—A sale of lands under execution, or other legal process, issuing after the death of the defendant therein, unless it be issued in pursuance of the statute (Code, of 1876, § 3213), in continuation of a lien acquired and kept alive in the life-time of the defendant, is a nullity, passing no title to the purchaser.—1 Brick. Dig. 893, § 43; *Hendom v. White*, 52 Ala. 597. The reason is obvious; there must be real parties to all process, original or final. Upon the death of the defendant, by operation of law, the title to his lands descends to his heirs, if he dies intestate; or, if he dies testate, devolves upon his devisees. The sale, of consequence, affects the title of new parties, who are entitled to a day in court, that they may, if they can, show cause against its divestiture.

The statute referred to declares, that “a writ of *feri facias*, issued and received by the sheriff during the life of the defendant, may be levied after his death, or an *alias* issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created.” Liens on lands, or on personal property, the statutes attach only to executions; and they take effect only within the county to which they are issued, and from the time the sheriff receives the writ. The continuance of the lien depends upon the regular issue and delivery of executions to the sheriff, from term to term.—Code of 1876, § 3210. If the execution is kept alive by the diligence of the plaintiff, that the death of the defendant shall not work a chasm in the proceedings, or a destruction of the lien, is the purpose of the statute; but, if it be not kept alive, it is equally the purpose of the statute that the lien shall be lost, and the death shall operate its usual, ordinary consequence,—an abatement or suspension of the proceedings.

That the *venditioni exponas*, and the sale of the lands under it, is a nullity, conferring no title upon the purchaser, in consequence of the death of the defendant at the time of its issue, is not denied, unless its issue and the sale were authorized by the statute which provides, that the lien on property levied on, and claimed as exempt, shall not be impaired or destroyed by the pendency of the claim or contest, nor by its termination, if found in favor of the plaintiff.—Code of 1876, § 2835. There

[Zelnicker v. Brigham & Co.]

was no termination of the contest in favor of the plaintiff—no determination that there was a lien upon the land. The abatement of the contest by the death of the defendant and claimant was not a determination in favor of the plaintiff—all that was decided or declared was, that the proceedings were suspended from the want of a proper party capable of conducting them to a final determination. The event, or condition, upon which the continuance of the lien and authority depended, had not happened. The lien of executions, the preservation or loss of them, the claim of exemption, and its contestation, are all strictly statutory, and with the requirements of the statute there can be no dispensation. There are, manifestly, just reasons for the preservation to a plaintiff of a lien established by the judgment of a court of competent jurisdiction, interrupted in its enforcement by legal proceedings instituted against him, which do not apply when there has not been, or can not be, an establishment of the lien by such judgment.

There is no error in the record, prejudicial to the appellant, and the judgment is affirmed.

Zelnicker v. Brigham & Co.

Creditor's Bill in Equity to set aside Fraudulent Conveyance.

1. *When creditor without lien may come into equity, to set aside sale or conveyance on ground of fraud.*—The statute authorizing a creditor without a lien to file a bill in equity, “to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor” (Code, § 3886), is not confined to cases in which a discovery is sought; nor is it necessary that the bill shall ask a discovery, or conform to the requisites of a bill for discovery.

2. *Same; construction of statute not dependent on location.*—This section was enacted long after the three sections immediately preceding it (3883–85), which relate to bills of discovery; and its scope and meaning are not affected by its relative location in the Code.

2. *Burden of proof as to consideration of conveyance assailed for fraud.* When an existing creditor attacks as fraudulent a conveyance executed by his debtor, and assails the consideration as simulated and fictitious, the *onus* is on the grantee to prove an adequate valuable consideration to support the conveyance, and its recitals are not evidence in his favor as against the complainant.

4. *Waiver of answer on oath.*—When an answer on oath is waived by the complainant (Code, § 3762), the answer is mere pleading, even if responsive, and is not evidence for any purpose.

5. *Amendment of answer, and of claim of exemption.*—When the original answer sets up an insufficient claim of exemption, its defects may be remedied by amendment; and an amended claim of exemption, allowed

[Zelnicker v. Brigham & Co.]

by the chancellor, will be treated by this court, if necessary, as an amendment of the answer.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 20th February, 1883, by the appellees, a mercantile firm doing business in Boston, Massachusetts, who sued as creditors of Joseph J. Zelnicker, against the said Joseph J. Zelnicker, and also against Mrs. Louise N. Zelnicker and her husband, Solomon S. Zelnicker; and sought to set aside, on the ground of fraud, a sale and conveyance of his stock of goods by said Joseph J. to Mrs. Louise N. Zelnicker, and to subject the stock of goods to the payment of complainant's debt, which was evidenced by the three promissory notes of said Joseph J., dated in October and November, 1882, payable four months after date, and aggregating nearly \$1,300. The sale and conveyance to Mrs. Zelnicker was made on the 12th February, 1883, on the recited consideration of \$1,100, part payment of an admitted indebtedness. The bill alleged that this sale and conveyance was made by said Joseph J. "with the intent to hinder, delay or defraud complainants, or others of his then existing creditors, of their just debts; that the said Solomon S. actively participated in said pretended sale, and in the transfer of such goods and accounts, and he and the said Louise N., his wife, participated and concurred in the aforesaid fraudulent intent of the said Joseph J.; that the alleged indebtedness from said Joseph J. to said Louise N. was altogether simulated and fictitious, or, if any thing was really due from him to her, the true amount thereof was intentionally exaggerated and swollen by all of said defendants, and the property and accounts so sold by him to her were estimated and taken at much below their real value."

The bill was not sworn to, and answers on oath were expressly waived. A demurrer to the bill was filed by Mrs. Zelnicker and her husband, on the ground that it was wanting in equity, because complainant had a complete and adequate remedy at law, if the sale and conveyance was fraudulent as alleged; and because it did not show that the property conveyed was worth more than \$1,000, which said Joseph J. might claim as exempt, and therefore complainants were not injured by the sale and conveyance. They also filed an answer, but not under oath, denying the charges of fraud and simulated consideration, and asserting that the goods were sold and conveyed to Mrs. Zelnicker, at their invoice price and actual value, in part payment of an existing debt for money previously borrowed, at different times, amounting to about \$1,800. Joseph J. Zelnicker adopted and concurred in the demurrer of his co-defendants,

[Zelnicker v. Brigham & Co.]

and also filed an answer, admitting the execution and delivery of the notes held by the complainants, denying the charges of fraud in the sale and conveyance to Mrs. Zelnicker, and asserting its validity. His answer contained, also, a claim of exemption in these words: "Further answering, respondent says, that he claims that the property described in the bill, as fraudulently conveyed by him to said Louise N. Zelnicker, to be of less value than one thousand dollars; that he is a resident of this State, and has selected said property to be exempted from sale and execution, or other process of any court, issued for the collection of any debt contracted since the 15th July, 1868, or since the ratification of the present constitution, by this defendant. Respondent hereby claims the same as part of the said exemption allowed him by law; and he further says, that complainants have no interest in the disposition he may make of said property as exempt, and have not been injured by the said sale thereof."

The complainants were afterwards allowed by the court, as the minute-entry recites, "to amend the bill by interlineation in red ink;" but the record does not show that this amendment was made, unless it refers to several lines in red ink which appear drawn across an averment in the original bill, "that said sale included substantially all the property of said Joseph J. subject to legal process for the satisfaction of his debts." A joint "demurrer and answer to the amended bill" was filed by all the defendants, repeating the causes of demurrer specified to the original bill, and adding this: "because said amended bill does not show that said Joseph J. had, at the time of said sale, no other property subject to legal process for the satisfaction of his debts;" and in their answer, while adopting their original answers, they alleged that said Joseph J., on the 12th February, 1883, "had no other property than sold by him on that day to said Louise N." On a subsequent day of the term at which this "demurrer and answer" was filed, a minute-entry was made as follows: "Defendant changes his answer to the amended bill, to an amendment to the answer." No testimony was taken by either party, but there is an admission of record, signed by the defendants' solicitor, "that said Joseph J. Zelnicker executed the notes described in the bill, and that the complainants are the holders of said notes, and that the same are unpaid, and are outstanding valid claims against said Joseph J."

The chancellor overruled the demurrers to the bill; and the cause being submitted for final decree, as the entry of submission recites, "on the pleadings and testimony," he rendered a decree for the complainants, declaring the conveyance of the goods fraudulent and void as against them, and that the prop-

[Zelnicker v. Brigham & Co.]

erty was held in trust for their benefit; but he further held that Joseph J. Zelnicker was entitled to claim an exemption of \$1,000 out of the goods, or the proceeds of their sale; and he ordered a reference of the matters of account to the register. The defendants appeal from this decree, and assign as error the overruling of their demurrers to the bill, and the decree declaring the sale and conveyance to be fraudulent. By consent indorsed on the transcript, there is a cross-assignment of error by the complainants, because the chancellor allowed the claim of exemption.

F. G. BROMBERG, for appellants.—(1.) The bill was wanting in equity, because the complainants had no lien on the goods, and did not file their bill as a bill of discovery. It does not contain the averments necessary in a bill of discovery; nor could it be maintained as a bill for discovery, since an answer on oath is waived.—Story's Eq. Pl. § 311; 10 Cush. 58; 24 Pick. 411. Section 3886 of the Code, under which the bill was filed, is to be construed in connection with the preceding sections (3882–85), which relate only to bills of discovery. *Lehman v. Meyer*, 67 Ala. 396. No discovery being asked, or needed, the remedy at law was complete.—*Carrille v. Stout*, 10 Ala. 796; Freeman on Executions, §§ 136, 138, 426. (2.) The bill was wanting in equity, also, because it does not show that the stock of goods conveyed was worth more than \$1,000, which the grantor might lawfully convey, since it was exempt from the payment of his debts; and therefore the allegations of fraud are not sufficient.—*Lehman v. Bryan*, 67 Ala. 559; *Shirley v. Teal*, 67 Ala. 452; *Fellows v. Lewis*, 65 Ala. 354; *McWilliams v. Rodgers*, 56 Ala. 92; 11 Wisc. 114; 44 Iowa, 613. (3.) The chancellor erred in holding the conveyance void. The bill, not being verified by affidavit, was mere pleading.—*Adams v. McMillan*, 7 Porter, 73; *Stetson v. Goldsmith*, 30 Ala. 602. The answers, though not under oath, put in issue the allegations of the bill.—*Reynolds v. Pharr*, 9 Ala. 560; *Railroad Co. v. Wheeling*, 13 Gratt. 40; 1 Dan. Ch. Pr. § 43, note 7. The bill charged fraud, and the answer denied it; and this was conclusive evidence for the defendant, without other proof.—*Br. Bank v. Marshall*, 4 Ala. 60; 1 Gres. Eq. Ev. 22. When an allegation involves a charge of fraud, the burden of proof is on the party who makes it.—*Tompkins v. Nichols*, 53 Ala. 197. The chancellor confounded the burden of proof with the weight of evidence, which are essentially distinct.—*Bridge Co. v. Butler*, 2 Gray, 130; 62 N. Y. 455; 25 Mich. 32; 9 Mete. 270; 13 Mees. & W. 662. (4.) The value of the goods not being shown, and the claim of exemption not being contested by the plaintiffs, the chancellor could not initiate a con-

[Zelnicker v. Brigham & Co.]

test for them. If the value of the goods was not greater than \$1,000, there could be no fraud in the conveyance (as shown by the authorities above cited); and the claim of exemption not being contested as required by the statute, it must prevail. That the claim was properly made, see *Sherry v. Brown*, 66 Ala. 51; *Smith v. Cockrell*, 66 Ala. 76.

R. H. CLARKE, *contra*, cited *P. & M. Bank v. Walker*, 7 Ala. 926; *Marriott v. Givens*, 8 Ala. 694; *Dargan v. Waring*, 11 Ala. 988; *Lehman v. Meyer*, 67 Ala. 396; *Hubbard v. Allen*, 59 Ala. 283; *Buchanan v. Buchanan*, 72 Ala. 55.

STONE, J.—The present bill was filed by simple-contract creditors, under section 3886 of the Code of 1876, which enacts, that “a creditor without a lien may file a bill in chancery, to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor.” It is contended for appellants, defendants below, that this statute was intended to apply only to cases in which a discovery is sought from defendants; and inasmuch as the present bill is not so framed as to call for a discovery, it is without equity. The argument is, that because the three sections immediately preceding the one under discussion relate to bills of discovery, construing them in *pari materia*, it must be confined to the same subject. Perhaps, a sufficient answer to this is, that we have uniformly ruled otherwise.—*Lide v. Parker*, 60 Ala. 165; *Evans v. Welch*, 63 Ala. 250, 256; *Lehman v. Meyer*, 67 Ala. 396, 402. We are not able to perceive any such connection as is contended for.

But there is a conclusive answer to the argument. Sections 3883–4–5 of the Code of 1876 have stood on our statute-books, without change, ever since the Code of 1852 went into effect. Code of 1852, §§ 2988 to 2990; Rev. Code, §§ 3443 to 3445. Section 3886 was enacted February 24th, 1860—Pamph. Acts, 35—as an independent grant of jurisdiction, and has been transcribed *verbatim* in the Codes since that time. Its collocation was the work of the codifiers, and can not demand a construction, which it could not have received before it was so placed. There is nothing in this objection.

Did the chancellor correctly rule, that the conveyance, or sale, of the stock of merchandise by Joseph J. Zelnicker to Louise N. Zelnicker, was fraudulent as against the creditors of the former? The bill charges that, before and at the time of the conveyance, complainants were creditors of the said Joseph J., and that the conveyance of the latter to said Louise N. was in payment of alleged indebtedness from him to her. The bill then avers, that said alleged indebtedness was “altogether sim-

[Zelnicker v. Brigham & Co.]

ulated and fictitious, or that, if any thing was really due from him to her, the true amount thereof was intentionally exaggerated and swollen by all of said defendants, and that the property and accounts so sold by him to her were estimated and taken at much below their real value." The claims of Brigham & Co., on which the bill is filed, consist of three promissory notes, all bearing date before the conveyance was made by John J. to Louise N. Zelnicker. In the foot-note to the bill is an express waiver of oath to the answers of defendants. This being the case, the answers, even if responsive, are mere pleading, and not evidence.—Code of 1876, § 3762. In the record, and noted in the note of submission, is a consent or agreement of counsel for defendants, admitting that the three notes sued on were executed by Joseph J. Zelnicker, that complainants are the holders of them, and that they are unpaid, valid, outstanding claims against him, the said Joseph J. The defendants offered no testimony. This case is thus brought directly within the principle declared in the case of *Hubbard v. Allen*, 59 Ala. 283, and *Buchanan v. Buchanan*, 72 Ala. 55. In such a contest, the burden of proving that the conveyance was founded on an adequate, valuable consideration, rests on the grantee; and failing to make such proof, the conveyance must be pronounced fraudulent. This the chancellor did, and did not err therein. This disposes of the material assignments of error made for appellants, adversely to their interests.

The assignments of error by appellees, indorsed on the transcript by consent of appellants, must share the same fate. True, the claim of exemption set up in the original answer is insufficient. But, while the case was in *feri*, the chancellor allowed an amended claim to be interposed. This was within his jurisdiction, and within the legitimate bounds of amendment. If necessary, we would treat that claim as an amendment of the answer. In substance and terms, it contains all needed averments.

The decree of the chancellor is affirmed. Let the costs of appeal be paid equally by appellants and appellees.

Noble v. Moses Brothers.

Bill in Equity to vacate Judgment, and for Account and Redemption under Mortgage.

1. *Fraud, as ground of equitable relief against judgment.*—The general rule is, that a court of equity will vacate and set aside a judgment at law, on the ground of fraud, *only* when the fraud was practiced in the rendition or procurement of the judgment itself; that fraud in antecedent transactions, not connected with the proceedings in the cause, and which would merely have constituted a good defense to the action, is not sufficient; and that the fraud must be actual and positive—utterly repugnant to honest intentions.

2. *Accident, mistake and fraud, as grounds of equitable relief against judgment.*—When there was no fraud in the act of obtaining or procuring the judgment, but equitable relief against it is sought on grounds which go to the merits of the original action, and which would have been available as a defense at law, the complainant is required to allege and prove, 1st, that he has a good and meritorious defense to the cause of action, or so much thereof as he proposes to litigate; 2d, that his failure to defend at law was not attributable to his own omission, fault, or neglect; and, 3d, that it was attributable to fraud, surprise, accident, or some act of his adversary, the plaintiff at law.

3. *Transactions between parent and child; equitable relief against.* Business transactions between a father and his unmarried daughter, whose guardian he had been until she attained her majority, and who then continued to reside in his household as a member of his family, will be scrutinized with watchful jealousy by a court of equity, and will not be permitted to stand, when it appears that, by the exercise of undue influence, the father obtained an improper benefit or advantage; and his failure to make a full disclosure of all material facts affecting his dealings with her, as between other persons occupying a fiduciary relation toward each other, would authorize the court to set aside such transactions, at the option of the daughter seasonably expressed.

4. *Same; dealings of father, as agent, with third persons.*—This principle can not be applied to third persons, who dealt with the father as agent of his daughter, advancing large sums of money to enable him to carry on farming operations in her name, and in whose favor the daughter, having executed a mortgage to secure such advances, afterwards confessed a judgment for the large balance due; when the evidence shows that the father was ruinously insolvent, and carried on his business operations, though nominally as agent of his daughter, really in secret trust for the benefit of himself and his family; and that the daughter knowingly lent him her credit, signed promissory notes for his indebtedness, on accounts furnished to him and admitted by him to be correct, and confessed the judgment for the amount of these notes. The plaintiffs in the judgment, in their dealings with the father, as shown by the evidence, having acted with the utmost fairness, good faith, and liberal indulgence, they are not chargeable with fraud on account of the fiduciary relation existing between the father and daughter, and his failure to make a full disclosure to her of all material facts connected with his said business transactions.

[Noble v. Moses Brothers.]

5. *Innocent sufferers by wrongful act of third person.*—Whenever one of two innocent persons must suffer by the wrongful act of a third person, he must bear the loss who enabled the third party to cause it.

6. *Usury.*—Usurious interest, when paid, can not be recovered back; yet, if any part of the debt remains unpaid, and even when it is carried forward into a new transaction, this balance may be abated by deducting the usurious interest paid.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 2d January, 1882, by Mrs. Lucy B. Noble, the wife of Edward F. Noble, against the persons composing the firm of Moses Brothers, a partnership doing business in the city of Montgomery; and sought to vacate and set aside, on allegations of fraud, undue influence, usury, and other grounds, a judgment for \$13,053.35, which the complainant had confessed in favor of the defendants, in the City Court of Montgomery, on the 13th March, 1877; also, for an account of the various transactions between the parties, both before and subsequent to the rendition of the judgment, and for redemption under a mortgage, which the complainant had executed to said defendants to secure an indebtedness growing out of the same transactions on which the judgment was founded.

The complainant was the daughter of B. H. Micou, and inherited from her deceased mother, jointly with her only sister, Clara E., a large estate, consisting of real and personal property. B. H. Micou became the guardian of his two daughters, by appointment of the Probate Court of Montgomery county, and gave bond in that capacity, with Thos. M. Barnett and Nich. D. Barnett as his sureties. In 1874, said Micou became hopelessly insolvent, through his connection with the Tallassee Manufacturing Company; and his daughter Clara having married with Frank Boykin, he was cited to make a settlement of his said guardianship. On this settlement, a decree was rendered against said Micou, in favor of each of his daughters, for more than \$80,000; and the property owned by him and his said sureties not being more than sufficient to satisfy these decrees, the daughters assigned the decrees to H. C. Semple, to be held and enforced by him on certain trusts specified in the assignment; that is to say, executions were to be issued on the decrees, and levied on all the property of said Micou and his sureties, including several valuable plantations; and when the property was sold under the executions, it was to be bought in by Semple at the amount due on the decrees, and was to be held by him for the benefit of the families of said Micou and Barnetts respectively, but each charged with a certain portion of the debt evidenced by the decrees. The property was

[Noble v. Moses Brothers.]

accordingly sold under the executions, and was bought in by Semple.

Among the property so sold was Micou's life-estate in a large plantation, together with all the personal property belonging to it, and the crops raised on it during the year 1874; "but," as the bill alleged, "inasmuch as it was the intention of complainant and her said sister that her father's family, consisting of his second wife and one child by her, should, during his life, have the benefit of the use of said plantation for their support and maintenance, and the same had been intended to be provided for in said deed of trust, the said H. C. Semple, under instructions from your oratrix and her sister, and for the purpose of carrying out the intent of said deed of trust, permitted said Micou to retain possession of said plantation for his said wife and child; and as said Micou was insolvent, and without credit, and his wife and child were, by reason of their *status*, unable to obtain credit, to make the possession of said lands useful by their cultivation, the said Micou induced your oratrix, who was just of age, and resided with him, and reposed in him all the confidence a daughter could repose in a father, to consent to have farming operations carried on in her name upon the said lands, and upon a plantation known as the 'Campbell place,' which belonged to her and her said sister, and was near to the other lands. Said Micou undertook to have said farming operations conducted in the name of your oratrix, and applied to said Moses Brothers, in her name, for a loan of money to assist in conducting the same. Said Moses Brothers agreed to make the advances, and thereupon prepared a mortgage for your oratrix to sign, of the crops and certain personal property, to secure advances for that year, not to exceed \$500 per month, which your oratrix signed; and thereupon said Moses Brothers opened an account on their books with your oratrix, which she states, on information, has been continued ever since. New arrangements were made, from year to year, for the advances for that year; but your oratrix has never seen any of the accounts of the said firm, except for the year 1879, as hereinafter shown, and she knows nothing of the contents thereof, except from information imparted to her within the last few months. Reposing every confidence in her said father, your oratrix left the conduct of the entire business to his management, and signed all papers presented to her for signature, without knowing the effect of the same, and without reading them; and all settlements between her and said Moses Brothers, from the opening of said accounts to the date of the last settlement, have been entirely between said Moses Brothers and said Micou."

The bill alleged, also, "that said Moses Brothers furnished advances to said Micou, agent, during said year, at the rate of

[Noble v. Moses Brothers.]

twenty-five per-cent. *per annum*, or other rate exceeding lawful interest, to the amount of \$2,500, and furnished to said Micon large sums of money, to be used by him for purposes other and entirely different from carrying on said plantations, or for family supplies, or for any of the purposes expressed in said mortgage, with full knowledge on their part that said money was to be so used, and in fact was so used; and they charged up, in their account against your oratrix, all the moneys so furnished by them, with the usury thereon. In the spring of the year 1876, when said Micon needed further advances to carry on farming operations for another year, said Moses Brothers declined to furnish any further advances, unless said Micon would procure from your oratrix a mortgage on lands to secure them in what they claimed was owing to them; and they then stated an account with said Micon, and claimed that your oratrix owed them a large sum of money, to-wit, the sum of \$13,460, after crediting her with the whole proceeds of sale of the crops raised on the several plantations during the year 1875; but said sum was largely made up of usurious interest, and charges against said Micon for which your oratrix was not in any sense liable. Said Moses Brothers never furnished any account of the items of said indebtedness to your oratrix, and never informed her in any way of what said indebtedness consisted; and they well knew that your oratrix did not know any of the particulars of the business so transacted between them and said Micon. Being desirous of procuring further advances, said Micon undertook, at the instance and request of said Moses Brothers, to procure said mortgage for them; and he represented to your oratrix that there was really due to said Moses Brothers, on account of advances made by them for the year 1875, the said large sum of money; when in fact and in truth, as your oratrix charges, the said sum for which they demanded that your oratrix should give the said mortgage security was, to a large extent, made up of said usurious interest, and of the sum of \$3,000, or other large sum, which said Micon was owing to them on account of certain transactions had between them in the year 1874, or prior to the dealings of your oratrix with them, and for which she never was or agreed to be liable; and your oratrix avers that, at the time of these transactions, she had no knowledge or information of these facts, and never had such knowledge or information until recently before the filing of this bill, but relied entirely on the statements made to her by said B. H. Micon; and the said Moses Brothers, knowing what authority and influence her father had with your oratrix, and how entirely she relied on his statements, induced the said B. H. Micon falsely to represent to your oratrix that the said amount truly represented the losses in the said farming opera-

[Noble v. Moses Brothers.]

tions for the year 1875, and was the sum due to said Moses Brothers; intending thereby fraudulently to procure from your oratrix a security for a debt which she did not owe, and which she was not bound to pay; and your oratrix, then believing that said Moses Brothers had it in their power to sell the personal property which she had mortgaged to them, for the payment of the whole of said amount, and that the said sum was the just amount of losses on the farming operations of the said previous year, and said Moses Brothers further offering, as an inducement, that they would extend the said indebtedness another year, and would not foreclose the mortgage on said personal property, then consented to execute the mortgage demanded of her, and on the 7th February, 1876, did execute her note for said sum of \$13,460.94, due the first of December then next, with interest from date, and, to secure the same, also executed a mortgage" on certain lands; and at the same time, in order to enable Micou to obtain advances for farming operations another year, she executed to said Moses Brothers "a crop-lien note and a mortgage on the crop and stock on said plantation, and on all other real estate in which she had any interest."

These are the material allegations of the bill as to the execution of the mortgage, and the consideration on which it was founded. As to the judgment afterwards confessed, the bill contained the following allegations: "At the end of the year 1876, fearing that your oratrix might become informed of the amount of usurious interest which they had charged up to her, and of the fact that they had charged to her an old debt against Micou, and other illegal and improper charges, and that she might set up the same in defense of their claim against her, said Moses Brothers demanded that they should be further secured in their said claim by having said note reduced to judgment against your oratrix, so as to conclude her against making any defense against the same; and refused to make any further advances to said Micou, except upon the terms of having said claim reduced to judgment against your oratrix, and offered and agreed with said Micou that, if he would induce your oratrix to consent that a judgment for said claim should be taken against her, they would continue to make such advances to him as he might [require], and would not enforce said judgment, but would hold the same simply as a security until the same could be conveniently paid off; and your oratrix being completely in the power of said Moses Brothers, having mortgaged to them all her property, and having no security left to offer to any other person, whereby supplies could be procured to carry on said farming operations, and it being then ruinous to abandon said farming business, said Micou undertook to ob-

[Noble v. Moses Brothers.]

tain from your oratrix, for them, a consent that judgment should be rendered against her upon said note. Said Moses Brothers never presented to your oratrix any statement of their account, and she was never informed of what their claim against her consisted; but, being influenced by her said father, and believing that said note truly represented what was due to them from her, your oratrix consented that a judgment should be rendered against her on said note." Accordingly, an action at law was instituted against her by said Moses Brothers, and service of process was accepted by her; and on the 13th March, 1877, a judgment by confession was entered against her, by attorneys whom she had authorized to do so, in favor of said Moses Brothers; and this judgment was entered for the full amount of the note with interest, though, as the bill alleged, the note was entitled to a credit of \$4,000, on account of money which Moses Brothers had received, on Micou's draft, from Lehman, Durr & Co. "Your oratrix did not have any *data*, from which she could ascertain what was the amount really due on said note and mortgage, and she relied entirely on the statement of her father as to the correctness of the sum for which she should confess judgment; and she avers that said Moses Brothers took advantage of the influence which her father had over her, to thus fraudulently and wrongfully obtain the said judgment against her, for a much larger sum than was really due on said note and mortgage; and your oratrix now claims the right to show that said judgment was fraudulent and wrongful as to her. After the rendition of said judgment, Moses Brothers insisted that said credit of \$4,000 should be erased from said mortgage, and said Micou consented to the same; and the said credit was erased, without the knowledge or consent of your oratrix."

At the commencement of the year 1879, the farming operations being carried on as before, it became necessary for H. C. Semple to sell some of the property which he held in trust, and which Moses Brothers desired to purchase; and by agreement among all the parties, the estimated price of the property being about \$10,000, Moses Brothers paid him \$6,000 in cash, and agreed to credit their judgment against complainant with the sum of \$3,950; and the further sum of \$5,000 having been obtained by loan from Lehman, Durr & Co., on Micou's draft accepted by Moses Brothers, they agreed that this sum should be credited on their said judgment. In reference to these matters, an agreement reduced to writing on the 28th April, 1879, and signed by said Moses Brothers and the complainant, contained the following recitals and stipulations: "Whereas, I, Lucy B. Micou, am indebted to Moses Brothers, of Montgomery, Ala., on account of advances for the year 1879, ex-

[Noble v. Moses Brothers.]

clusive of crop-lien mortgage for \$6,000, in the sum of \$1,100, as evidenced by two bills of exchange," particularly described, "and by balance brought down to new account, as of March 20th, 1879, as stated in another agreement this day signed by me, in the sum of \$654.50; also in sundry other sums advanced to me and to my agent, B. H. Micou, and agreed by them to be advanced to me and my said agent, at my request, whether for plantation purposes, family expenses, insurance, taxes, or other purposes, paid out or to be paid out on the order of myself or my said agent, estimated and agreed by me not to exceed the sum of \$600, from March 20 to September 1st, 1879; making the estimated sum which will be due by me on these advances, on Sept. 1st, 1879, about or nearly \$2,400 in the aggregate: Now, therefore, in consideration of the premises," said Lucy B. Micou assigned to said Moses Brothers all her accounts against the tenants and laborers on three specified plantations, and all crops received from them, to be sold by Lehman, Durr & Co., on commission, and to make up any deficiency out of the surplus of the crop conveyed by the \$6,000 mortgage, &c. "And we, the said Moses Brothers, in consideration of the said agreements made by said Lucy B. Micou, agree to make the advances as aforesaid, not to exceed \$2,400; also, to credit said mortgage now in judgment with the sum of \$3,950, being the amount received of H. C. Semple, for account of said Lucy B. Micou, March 27th, 1879, as of that date; and with the further sum of \$5,000, being the amount received of Lehman, Durr & Co., for account of said Lucy B. Micou, March 28th, 1879, as of that date; and we further agree that the balance due on said old mortgage now in judgment, after being credited with said sums of \$3,950 and \$5,000, may be paid as follows," specifying four annual installments, the last falling due March 25th, 1883; "provided, however, that on default in the payment of any one of the above stated payments, the entire amount of said old mortgage now in judgment shall be due and payable."

The bill alleged that these credits had never been entered on the judgment, and that Moses Brothers were proceeding to enforce the judgment for its full amount; and prayed that, on the hearing, said judgment be credited with said sums, as of the dates above specified; "and that it be further decreed that said judgment is not conclusive on your oratrix, but that the same may be opened for the purpose of crediting the debt on which the same was founded with all just credits to which she was entitled at the time the same was rendered; and that all usurious interest charged against her by said Moses Brothers, upon any part of said debt, with all other improper charges, be allowed to her as credits on said debt; and that an account be stated between your oratrix and said Moses Brothers of all dealings

[Noble v. Moses Brothers.]

between them since the execution of said note and mortgage; and that on said accounting all charges for illegal or usurious interest may be disallowed, and all other charges for which your oratrix is not legally liable, and she be credited with the proceeds of all crops raised on said plantations and delivered to said Moses Brothers, and with such other items of credit as she may be justly entitled to; that if, upon such accounting, it shall appear that the said debt has been fully paid, then said judgment shall be decreed to be satisfied in full, and said mortgage cancelled;" and for other and further relief under the general prayer.

An amended bill was afterwards filed, which alleged that, "at the end of the year 1875, said Moses Brothers, who had received, as mortgagees, the crops raised by complainant on said three plantations during that year, and had sold the same, or had them sold for their benefit, and were under obligation to keep and render true accounts of their dealings for her as her factor and trustee, and who had notice that she was only carrying on business on said plantations, made up an account with your oratrix, purporting to truly represent her indebtedness to them on account of the transactions for the year 1875, as balanced up to February 7th, 1876; but your oratrix avers that said Moses Brothers, knowingly and fraudulently inserted in said account an item of over \$5,000, as of date January 1st, 1876, for which they knew she was in no manner liable; the said item being a balance on their books against one F. S. Boykin, contracted by him with said Moses Brothers during the year 1875, and so charged up to your oratrix without her knowledge or consent. Your oratrix never had any connection whatever with the transactions resulting in said balance against Boykin, and never knew or suspected, until after the filing of her original bill in this case, that any such sum or item had been charged against her. She reposed entire confidence in said Moses Brothers, who were her agents for the collection of the rents of her real estate in the city of Montgomery, and were mortgagees of her crops, and her trustees for the sale of the same, to keep and render true and accurate accounts of all her transactions with them; and she likewise reposed the same confidence in her said father for the honest and faithful discharge of his duty as her agent, of which said Moses Brothers were well informed; and for these reasons she took it for granted that all dealings between said Moses Brothers, as her agents, mortgagees and factors, and said Micou as her agent, were correct, and therefore never inquired into any of them, nor examined or saw any of the accounts, but signed, without hesitation, all papers presented by her father for her signature, relating to the management of said business, which she left

[Noble v. Moses Brothers.]

wholly to said Moses Brothers and her father." It was alleged, also, that this item was so charged against the complainant, and included in her said note on which the judgment was obtained, pursuant to an agreement between said Moses Brothers and Micou, of which she had no knowledge or information; that Micou had no authority to make any such agreement, and Moses Brothers knew that the act was a violation of the trust and confidence reposed by complainant in him and them; and that said Moses Brothers, in thus including said item in the note and mortgage, and taking judgment for the amount of the account thus wrongfully enlarged, committed a fraud upon her, and the judgment should not be held binding on her.

An answer to the bill was filed by Moses Brothers, and also an answer to the amended bill. They denied the charges of fraud, misrepresentation and concealment on their part, and denied that any confidential relations ever existed between themselves and the complainant. They alleged that, in the beginning of their business transactions with Micou, they agreed to render him assistance in the cultivation of the several plantations under his charge, as a matter of personal favor to him, and in return for kindness which they had formerly received from him; that the business of the plantations was in fact carried on by Micou for the benefit of himself and his family, though nominally in the name of his daughters; that one of the plantations, during the year 1874, was conducted in the name of said F. S. Boykin, who had married Clara E. Micou, and the others in the name of the complainant, though the entire business was managed by said Micou, who gave them no reason for wishing the accounts so kept; that at the end of the year, a large balance being due to them from Micou, they could not make advances to him another year, unless arrangements were made by which they could borrow the necessary moneys; that they were not engaged in the business of lending money, nor making advances on crops; that Micou assured them that his daughter, the complainant, would lend him her name and credit to carry on the farming operations, and would sign the necessary papers to extend and continue his indebtedness; that they had but slight acquaintance with the complainant, but knew that she had a large estate, and was living with her father, and was able to assist him; that they had the notes and mortgages prepared, and handed them to Micou, who returned them with the complainant's signature; that they always rendered full and accurate accounts to Micou, and had no reason to suppose that he withheld any information from the complainant. They denied the charge of usury, and alleged that, when they were compelled to borrow money for Micou, they only charged him the same rate of interest they were compelled to pay for

[Noble v. Moses Brothers.]

the money. They alleged that the note for \$13,460 was given for the amount of Micou's actual indebtedness to them at that time, on account of the farming operations carried on in his daughter's name; that full and accurate accounts of all these matters were furnished to him from time to time, and he procured his daughter's signature to the note and mortgage without any interview or communication between her and respondents; that they then had full confidence in the integrity and honor of Micou, and did not believe that he made any fraudulent concealment or misrepresentation of facts to procure her signature. They alleged that they insisted on the recovery of a judgment in their favor, because the indebtedness was increasing every year, and they wished a judicial ascertainment of the amount due them; and that the judgment was confessed for the amount actually due, and admitted to be due to them. They admitted that they had not entered the credits on said judgment, as stipulated in the written agreement above set out, and insisted that they were not bound to do so, because Micou had perpetrated a fraud on them in inducing them by false representations to enter into said agreement; and because they had been compelled themselves to pay the \$5,000 borrowed from Lehman, Durr & Co. on their acceptance, which the complainant had promised to pay, but had failed to do so, and that the promise on her part was the only consideration for their promise to enter the \$5,000 as a credit on the judgment.

On final hearing, on pleadings and proof, the chancellor held that the judgment was valid and binding, but that the complainant was entitled to an account of all subsequent transactions between her (or B. H. Micou as her agent) and Moses Brothers, and that she was entitled to have a credit of \$5,000 entered on the judgment, as stipulated in the written agreement above set out; and he further held that the charge of usury was not sustained.

From this decree the complainant appeals, and here assigns as error the refusal of the chancellor to open and set aside the judgment, and his refusal to sustain the charge of usury; and there is a cross assignment of error by Moses Brothers, based on that part of the decree which required a credit of \$5,000 to be entered on their judgment.

GUNTER & BLAKEY, and RICE & WILEY, for the complainant. The bill is filed on the concession that Micou was the lawful agent of the complainant, and that she is bound by all his acts done within the scope of his authority, or ratified by her with full knowledge of all the facts which ought to have been communicated to her; but, starting with this concession, it is insisted that the defendants have taken advantage of the relation

[Noble v. Moses Brothers.]

of trust and confidence which existed between her and her said agent and father, and of which they had notice, to procure a judgment by confession for a large amount, including items aggregating thousands of dollars, for which she was in no sense liable, and which she never would have recognized as a part of her indebtedness if she had been informed of the facts. Although the relation of guardian and ward between the complainant and Micou had ceased, its influence continued, with the superadded relation of father and child; and she remained a member of his family and household. Business dealings between persons thus situated are scrutinized closely by a court of equity, and are never sanctioned, unless shown to be characterized by the utmost good faith, which involves a full disclosure of all material facts, and the removal of all undue influence. Story's Equity, §§ 307-09; *Huguenin v. Baseley*, 2 L. Cas. in Eq. 598, mar.; *Whelan v. Whelan*, 3 Cow. 537; *Whelan v. McCrary*, 64 Ala. 326; *Lee v. Lee*, 55 Ala. 590; *Rhodes v. Bate*, 1 L. R. Chan. App. 252; *Taylor v. Taylor*, 8 Howard, 199. These principles apply with equal force to the transactions between the complainant and Moses Brothers, conducted through the agency of Micou. They had notice of Micou's agency, and were bound to know the extent of his authority; and they can not reap the fruits of any advantage obtained over the complainant by their dealings with her agent, in direct violation of his trust. The burden of proof was on them to show that the fullest information was imparted to the complainant of all facts which she ought to have known; and they can neither shield themselves behind the fact of Micou's agency, nor invoke the estoppel of the judgment.—*Huguenin v. Baseley*, 2 L. Cas. Eq. 598; *Whelan v. Whelan*, 3 Cowen, 537; *Taylor v. Taylor*, 8 Howard, 199; *Pierce v. Wilson*, 34 Ala. 607; *Bowers v. Johnson*, 10 S. & Mar. 169; *Beaumont v. Boulbee*, 5 Vesey, 492; *Rogers v. Batchelor*, 12 Peters, 231; 19 Amer. Dec. 603; 2 Texas, 331; *Archer v. Hudson*, 7 Beavan, 560; *Oliver v. Piatt*, 3 How. 363; *May v. LeClaire*, 11 Wall. 217; 11 Jur. N. S. 254; *Baker v. Bradley*, 7 DeG., M. & G. 597; *Seecombe v. Sanders*, 34 Beavan, 382; *Maitland v. Brown*, 15 Sim. 437; *Hamilton v. Mohun*, 1 P. W. 118; 2 Wash. C. C. 397; *Hall v. Perkins*, 3 Wendell, 626; Hov. Fr. 501; *Dent v. Bennett*, 7 Sim. 239; *Gibson v. Russell*, 2 Y. & C. 578; *Popham v. Brooke*, 5 Russ. 7; *Boyce v. Grundy*, 3 Peters, 219; *Lester v. Mahan*, 25 Ala. 445; *Simpson v. Lord Howden*, 3 M. & C. 97; *Pearce v. Olney*, 20 Conn. 544; 7 Ill. 385; 3 Md. Ch. 322; 1 John. Ch. 320; 2 Iowa, 55; *Wormley v. Wormley*, 8 Wheaton, 442; 36 Vermont, 608; 43 Wisc. 213; *Waddell v. Lanier*, 62 Ala. 347; *Whetstone v. Whetstone*, 31 Iowa, 276; 2 P. W. 74; 1 Sch. & Lef. 355; 12 N. Y. 165; 20 Iowa, 172.

[Noble v. Moses Brothers.]

TROY & TOMPKINS, *contra*.—If the allegations of the bill were fully sustained by the proof, they would not make out a case for equitable relief against the judgment; since they do not show fraud in the rendition of the judgment, nor that it was procured by accident, mistake, or fraud, unmixed with negligence on the part of the complainant herself.—*McGrew v. Bank*, 5 Porter, 547; *Stinnett v. Br. Bank*, 9 Ala. 120; *Garrett v. Lynch*, 45 Ala. 204; *Waring v. Lewis*, 53 Ala. 615; *Taliaferro v. Br. Bank*, 23 Ala. 755; *Foster v. Wood*, 6 John. Ch. 87; *Miller v. Gaskins*, 1 Sm. & Mar. Ch. 524; *Kinney v. Ogden*, 2 Green's Ch. 168; Freeman on Judgments, 485, 528; 1 Dill. C. C. 536; 2 Story's Equity, § 1575; *Hair & Labuzan v. Lowe*, 19 Ala. 224; *Holt v. Agnew*, 67 Ala. 360; *Green v. Thompson*, 2 Ired. Eq. 365; 23 N. J. Eq. 486; *Nace v. Boyer*, 30 Penn. St. 99; 94 U. S. 207. The evidence acquits the defendants of all blame, and establishes the utmost good faith, fairness and generosity, on their part, in all their dealings with Micou. They furnished to him full and accurate accounts, from time to time, of all their transactions, and had the right to presume that these accounts were submitted to his daughter, and were understood and approved by her. If these accounts were never submitted to her, or if any of the transactions of her said agent, to whom she loaned her name and credit, exceeded his authority, and were injurious to her, the fault can only be attributed to the wrongful conduct of her agent, and to her own misplaced confidence in him. The charge of usury, also, is not sustained by the evidence; and as to all transactions antecedent to the judgment, it is not an open question.—*Perkins v. Cowart*, 29 Ill. 184; Tyler on Usury, 403, 450; *Munter & Faber v. Linn*, 61 Ala. 493; *Smith v. Stoddart*, 10 Mich. 148; 12 Iowa, 300. On the facts proved, it is submitted that the defendants ought not to be compelled to enter credits on their judgment, as stipulated in the written agreement of April 28th, 1879, when the complainant has failed to comply with her promises which constituted the consideration for that agreement.—1 Brick. Dig. 692, § 758; 1 Story's Equity, §§ 742, 750, 769, 770; *Gentry v. Rogers*, 40 Ala. 442; *Stuart v. Peay*, 21 Ark. 117.

SOMERVILLE, J.—The purpose of the present bill is to vacate and set aside a judgment for something over thirteen thousand dollars rendered in the City Court of Montgomery, on March 13, 1877, against the appellant as defendant, and in favor of the appellees, Moses Brothers; and, furthermore, to bring the appellees to account as mortgagees, and to redeem the mortgaged property. The judgment in question was confessed in open court by an attorney, on the written authority of ap-

[Noble v. Moses Brothers.]

pellant, who was then unmarried and of age; the debt being evidenced by her promissory note, which was at the time secured by a mortgage on her property, and which had been put in suit by regular issue of summons and complaint.

The chief point of contention relates to vacating the judgment upon the alleged ground of fraud, accident and surprise; and the case involves the consideration of the circumstances under which this particular jurisdiction of equity can be invoked. There can be no controversy as to the general rule on the subject. It is settled to be, that the fraud which is imputed to the plaintiff in the judgment, and for which alone a court of equity will intervene to vacate or enjoin, must be *fraud in the rendition or procurement of the judgment itself*. *Crommelin v. McCauley*, 67 Ala. 542. Or, as expressed by Mr. Story, "the fraud must have been practiced in the very act of obtaining the judgment"—there must be "fraud in its concoction."—2 Story's Eq. Jur. § 1575. Fraud as to transactions antecedent to the judgment, such as would merely have constituted a good defense to the action, and not connected with the *proceedings* by which it was obtained, is deemed insufficient. Freeman on Judgments, §§ 489-490; Story's Eq. Jur. § 1574.

The nature of the fraud, too, must be such as is utterly repugnant to honest intentions. It must, in a sense, be shown to be actual and positive. To this end, there must exist the *malus animus*, "putting itself in motion, and acting in order to take an undue advantage, for the purpose of actually and knowingly committing a fraud."—Kerr on Fraud and Mistake, 353. When this is clearly established by proper proof, as said in a former decision of this court, "it is honorable to our system of equity jurisprudence, that such infection of fraud is made to vitiate every transaction, and the solemn judgments of courts are no exception to the salutary rule."—*Crommelin v. McCauley*, 67 Ala. 547, *supra*.

If there be no fraud in the act of obtaining or procuring the judgment, and equitable relief be sought against the judgment on a ground which went to the merits of the original suit at law, and which would have been available in that forum, the complainant is required, as a condition precedent to relief, to prove, as well as aver, three things: *first*, that he has a good and meritorious defense to the cause of action, or so much of it as he proposes to litigate; *second*, that his failure to defend at law was not attributable to his own omission, fault, or neglect; and, *third*, that it was attributable to fraud, surprise, accident, or some act of his adversary, the plaintiff in the judgment. *Weems v. Weems*, 73 Ala. 462; *Collier v. Falk*, 66 Ala. 223; Freeman on Judgments, § 486; Willard's Eq. Jur. 161-163. There will be, in other words, no interference with the judg-

[Noble v. Moses Brothers.]

ment at law, or re-opening of the litigation involved in its rendition, unless a defense at law was prevented "because of accident, or the fraud or act of his adversary, unmixed with fault or negligence on his part."—*Waring v. Lewis*, 53 Ala. 615; *Duckworth v. Duckworth*, 35 Ala. 70; 2 Story's Equity Jur. §§ 887-8.

We can not see that the testimony in the present case authorizes us to grant the complainant the relief sought, under either of the principles above stated. The chancellor refused to allow the judgment to be vacated, on either of these grounds; and in this, we think, his decree must be sustained.

It may be conceded, perhaps, that the facts disclosed in the record would entitle the complainant to relief against Micou, through whose operations and agency her large indebtedness to the defendants seems to have been contracted. He was the father of the complainant, and had a few years ago been her guardian. She continued to reside in his household, and her transactions with him may not improbably have been affected by the pressure of their fiduciary relations. Transactions between a parent and child, under such circumstances, would be scrutinized with watchful jealousy by a court of equity, and would not be permitted to stand, if it appeared that a naked bounty had been conferred, or a large benefit derived by the parent and late guardian through the instrumentality of undue influence. And certainly the rule in such cases is, that the failure of one holding such a fiduciary position to make an honest disclosure of every material fact, affecting his contracts or dealings with his child and late ward, would authorize such transactions to be avoided, at the option of the injured *cestui que trust*, if seasonably expressed.—1 Perry on Trusts, §§ 178, 200-201; Kerr on Fraud and Mistake, 177-181; *Andrews v. Jones*, 10 Ala. 400.

It is insisted that the defendants, Moses Brothers, in whose favor the judgment in controversy was rendered, can reap no benefit from it, because it was procured through the influence of Micou, acting upon the daughter through the pressure of their fiduciary relations, which were known to defendants, and that *the failure of Micou to disclose to her the nature and details of the indebtedness was a fraud for which the defendants were responsible.*

The exact relation of Micou and his daughter, the complainant, in these various transactions, in its legal aspect, is a matter of controversy. The theory of complainant's whole bill is that it was a mere agency, she being the principal, and conducting the entire farming operations, for her own benefit, through her father as her agent. The proof, in our judgment, fails entirely to sustain this view. It shows very clearly that Micou was the

[Noble v. Moses Brothers.]

chief, if not sole beneficiary of his own transactions. His assumed agency was entirely nominal, presenting only the outward form and appearance of reality. Its obvious purpose was to protect him and the fruits of his planting operations from the pursuit of creditors. He was in a state of ruinous insolvency, and this purpose of the pretended agency is not only transparent throughout the entire evidence, but was manifestly known to the complainant herself, as disclosed in her own testimony. While for this reason the farming operations were ostensibly conducted in Micon's name as agent, the clear design of both himself and complainant was that she would *lend him the aid of her credit*, which seems to have been good, but a secret trust of the profits was reserved for his benefit, for the general support of the family, of which complainant was a member.

It is not denied that every item constituting the judgment debt was a valid claim against Micon, who admits it to have been a debt of just and honorable obligation. It is asserted, however, that more than half of the amount was incurred by him in farming operations carried on otherwise than in his capacity as "agent," which is shown to be true, and that this fact was unknown to complainant, either at the time she assumed to pay it, by executing her various obligations, or at the time she confessed the judgment. This is, in our opinion, entirely immaterial so far as the defendants, Moses Brothers, are concerned. As to them, it was a mere obligation on complainant's part to stand as security for a claim due by her father, which, in the first instance, was thought by all parties concerned to have been amply secured by mortgage liens upon large crops which he contemplated raising. Though an absolute liability in form, it was in practical effect only conditional. The specific amount of the debt, too, was designated, so that she was aware of the exact liability. Though in form it was her debt, purporting to have been incurred by him as agent, it was really his debt for the extension of which she had loaned him her credit.

We are unable to see that Micon's conduct towards his daughter was characterized by any wrongful intentions. He evidently did not expect at first even to financially involve her, but was sanguine of reaping large profits from his enterprises. Nor is he shown to have used any solicitation or undue powers of persuasion to induce her co-operation in these enterprises. The law exacted of him, however, in view of his relations of confidence, the utmost good faith. It was not enough for him not to misrepresent, but he should have made a disclosure of every material fact, in his dealings with complainant, which would probably have affected the volition of any other adversary contracting party, dealing with him under circumstances

[Noble v. Moses Brothers.]

freed from the bias of fiduciary influences.—1 Perry on Trusts, § 178. It was his unquestionable duty to have informed her fully of the nature of the debt for which he secured her several written obligations.

It becomes important to inquire how far the defendants are chargeable with liability for this breach of legal duty on the part of Micou, which may have operated *prima facie* to render him a trustee, holding any of the fruits of his enterprise for the reimbursement of complainant *as between themselves*. They are shown to have acted towards Micou, not only with the utmost fairness and good faith, but also with the most liberal indulgence. They knew that he had been the guardian of complainant, and that she was living with him in the same household as his daughter. They also knew that the relation of guardian and ward had ceased three or four years previous, that complainant had procured the removal of the disabilities of non-age by decree of the chancellor, that she has since attained her majority, and purported to have the full control and management of her property. It could not be considered unreasonable for them to indulge the belief that, under these circumstances, a sufficient time had elapsed for the complainant to have become measurably emancipated from all undue influences of the previous relationship, so that it would be highly meritorious and honorable for her to aid him in the support of his family, when no other resource appears to have been left him.—*Hylton v. Hylton*, 2 Ves. 547; 1 Perry on Trusts, § 200. So, with a knowledge of the relation of parent and child existing between complainant and Micou, which must be admitted to be one of confidence, and often of controlling influence. Yet contracts between persons occupying this position can not be said, for this reason merely, to be *prima facie* void, without some affirmative proof of undue influence. The law recognizes the parental influence as a rightful and proper one, and it can not be presumed, in the first instance, that “a parent would make use of his authority and parental powers to coerce, deceive or defraud his child.”—1 Perry on Trusts, § 201; *Jenkins v. Rye*, 12 Pet. 253. Hence, it has been adjudged, that the mere fact of a daughter, soon after coming of age, voluntarily giving securities to a creditor of her father in payment of his debts, is not of itself sufficient ground for imputing undue influence to the father.—*Thomber v. Sheard*, 12 Beav. 589.

The defendants are shown to have had great confidence in the honesty and good faith of Micou, and seem never to have doubted the integrity of his purposes towards them until some four or five years after the commencement of their dealings with him, and several years after the creation of the judgment debt in controversy. He had been clothed by the complainant

[Noble v. Moses Brothers.]

with the power of using her credit in his farming transactions. She had repeatedly signed, in her own person, the various notes, bills of exchange, mortgages and other securities relating to this business. These papers contain numberless recitals sufficient to have excited her inquiry as to the nature of at least some of her obligations. The defendants were personally unacquainted with complainant, and had all their dealings with Micou, who was intrusted with the entire authority of management. They rendered to him full and accurate statements of the accounts between them from time to time, including the various items to which objection is taken. These accounts they had every reason to expect that Micou would exhibit to her, and in fact that he had done so, in as much as she repeatedly executed her written obligations for the balances shown against her, which were returned by Micou, as her reputed agent, to the hands of the defendants. The complainant can not be heard to assert, under these circumstances, that notice to Micou, acquired by him through the very medium of this assumed agency, was not notice to her. It is a general principle of equity, that "wherever one of two innocent parties must suffer by the acts of a third, he who has enabled the third party to occasion the loss must sustain it."—*Taylor v. Great Indian &c. Co.*, 4 D. & J. 594; *Allen v. Maury*, 66 Ala. 10.

We place no great stress upon the fact that the judgment sought to be vacated was one obtained by *confession*. This confession was obtained on a written power of attorney signed by complainant, and directed to her own counsel. It specified the exact amount for which it was to be taken, which was evidenced by complainant's promissory note, secured by mortgage, and upon this written evidence of indebtedness a regular suit had been instituted, and would have authorized a judgment by default in favor of the payee had there been no defense. The putting of the claim in judgment was an act of ordinary prudence under the peculiar circumstances, and in it we discern nothing pregnant with suspicion of unfairness or disbelief of its validity on the part of the claimants.

It is very clear to our mind, that the evidence in this case fails to show that there was any fraud whatever on the part of Moses Brothers in procuring or obtaining the judgment, nor does their knowledge of the particular facts of which they are shown to be informed impute to them constructively any actual or positive fraud, such as would authorize the vacating of the judgment. They are entirely guiltless, throughout their whole dealings, so far as we can see, of any art, contrivance or device by which an unconscionable advantage has been sought to be gained by any one. Nor are they chargeable with any complicity in the alleged fraud of Micou, in concealing the nature

[Noble v. Moses Brothers.]

and character of the debt in controversy from the complainant. *Moog v. Strang*, 69 Ala. 98; *Holt v. Agnew*, 67 Ala. 360. We are equally clear in the conviction that, if the complainant had any meritorious defense in the action at law, she was prevented from making it by her own negligence, and not because of accident, or the fraud, or other act of the plaintiff in the judgment.

We are not disposed to disturb the conclusions of the chancellor as to the credit of five thousand dollars ordered to be allowed on the judgment in taking the account. This amount, which was received from Lehman, Durr & Co., appears sufficiently to have been intended as an unconditional credit, and not dependent on a mere executory agreement to constitute it a payment.

The instruction of the chancellor as to the matter of usury, however, we deem to be erroneous. The statute not only provides that usurious contracts "shall not be enforced, except as to the principal," but further prescribes that "if *any interest has been paid*, the same must be deducted from the principal, and judgment rendered for the balance only."—Code, 1876, § 2092. This statutory provision does not, of course, forbid the exaction by a court of equity of lawful interest, as a condition precedent to the granting of relief to any complainant invoking its jurisdiction. Nor does it authorize the recovery of usurious interest as to contracts entirely executed by the full payment of principal and interest. But, where any portion of a debt remains unpaid, this balance may be abated by deducting from it the usurious interest. So, if such *balance*, remaining over from an old usurious transaction, is carried forward and incorporated as a portion of the consideration of a new obligation, the super-added part of which is free from the taint of usury, the question of usury may be investigated *as to such balance*, which is alone affected by it, without imparting any taint to the super-added debt. It is manifest, and has often been decided, that the legal effect of the statute is to render such contracts voidable merely, and not void.—*Bradford v. Daniel*, 65 Ala. 133.

No inquiry can, of course, be made as any usurious interest which was included in the note of the complainant which was reduced to judgment. As to that transaction, the defense must be considered as waived, and such inquiry as precluded. The credit of five thousand dollars, however, which it is held that complainant was entitled to have entered on the judgment, will authorize a corresponding abatement of the credits on her other indebtedness, and therefore will result in an increase of such indebtedness in precisely the same amount.

The decree of the chancellor is reversed, and the cause remanded, that further proceedings may be had, on reference to the register, in accordance with the foregoing opinion.



INDEX.

ACCOMPLICE. See CRIMINAL LAW, 1-3.

ACCORD AND SATISFACTION.

1. *Acceptance of part, in satisfaction of debt.*—At common law, a promise by the creditor to accept less than the full amount of his debt, or its acceptance, no release being given, and the evidence of the debt not being surrendered, did not operate as a payment, nor as an accord and satisfaction; but, under the statute declaring that “all receipts, releases, and discharges in writing, must have effect according to the intention of the parties” (Code, § 3039), such acceptance may amount to full satisfaction. *Cowan & Co. v. Sapp*, 44.

ACTION.

1. *Action for money paid on wager; statutory provisions.*—The statute declaring all gambling contracts void, and giving an action to recover back money paid under them (Code, § 2131), applies only to actions between the parties to such contracts, and does not affect actions against stakeholders. *Lewis v. Bruton*, 317.
2. *Action against stakeholder, for money deposited on wager; lies when.* When money is deposited with a stakeholder, on a wager, either party may withdraw from the illegal transaction, and demand the return of his money, at any time before it has been paid over to the winner after the result is ascertained; and the loser may maintain an action against the stakeholder, if the latter pays the money to the winner after notice by the loser not to pay it. *Ib.* 317.
3. *Same.*—The wager being on the result of a congressional election in a particular district, a payment by the stakeholder to the supposed winner after the result of the election is “generally known,” or “publicly announced,” but before the issue of an official certificate by the proper officer, is premature, and is no defense to a subsequent action by the loser, who, before the issue of the certificate, notified the stakeholder not to pay; but, *it seems*, the stakeholder may safely pay over the money after the official announcement of the result, without waiting for the decision of an uncertain contest. *Ib.* 317.
4. *Action for money had and received; amendment of complaint.*—Under the common money counts, a recovery can not be had for the proceeds of cotton sold after the commencement of the suit, although they were added to the complaint by amendment subsequent to the sale. *Graham v. Myers & Co.*, 432.
5. *Waiver of tort in unauthorized sale.*—When a person’s goods have been wrongfully sold or converted, he may waive the tort, and recover the money received for them; but a creditor, or any other

ACTION—*Continued.*

- person, can not make this election for him. *Blackshear v. Burke*, 239.
6. *Promise for benefit of third person.*—A promise to one person, to pay a debt due from him to another, enures to the benefit of the latter, and may be enforced by him. *Young v. Hawkins*, 370.
 7. *Action against corporation; for malicious prosecution.*—An action on the case for a malicious prosecution may be maintained against a corporation. (The case of *Owsley v. M. & W. P. Railroad Co.*, 37 Ala. 360, on this point, is against the weight of more recent decisions, and is overruled.) *Jordan v. Ala. Gr. So. Railroad Co.*, 85.
 8. *Action against corporation; where brought.*—By express statutory provision (Sess. Acts 1878-9, p. 197), an action against a private corporation, founded on a transitory cause of action, may be brought in any county in which the corporation transacts business through its agents, without regard to the location of its principal office, or its ownership of real estate; and this statutory provision is not invalid on constitutional grounds. *Mobile Life Ins. Co. v. Pruett*, 487; *Home Protection v. Richards & Sons*, 466.
 9. *When case lies, and when assumpsit.*—For the breach of an ordinary contract, which involves no element of tort, an action of assumpsit is the proper remedy, and an action on the case will not lie; but, when a duty is imposed by the contract, or grows out of it by legal implication, and injury results from the violation or disregard of the duty, an action on the case will lie to recover damages, although an action of assumpsit might also be maintained for the breach of duty. *Mobile Life Ins. Co. v. Randall*, 170.
 10. *Same.*—Whenever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, the party injured may maintain an action on the case; and if the transaction had its origin in a contract between the parties, the contract is mere matter of inducement. *Ib.* 170.
 11. *Innocent sufferers by wrongful act of third person.*—Whenever one of two innocent persons must suffer by the wrongful act of a third person, he must bear the loss who enabled the third party to cause it. *Noble v. Moses Brothers*, 605.

ADULTERY. See CRIMINAL LAW, 4, 5.

ADVANCES TO MAKE CROP.

1. *Sufficiency of recitals in note.*—A writing which expresses as its consideration "necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me *bona fide* for the purpose of making a crop the present year;" and further declares, "without such advances it would not be in my power to procure the necessary teams, provisions, money, implements, &c., to make a crop the present year,"—shows a substantial compliance with the requisitions of the statute (Code, § 3286), and creates a statutory lien on the maker's crop. *Connor v. Jackson*, 464.
2. *Agreement construed, as to conflicting claims of landlord and merchant making advances.*—Under a written agreement between a landlord, claiming a statutory lien on his tenants' crops for rents and advances, and a merchant claiming a statutory lien for advances, by which it is stipulated that P., the merchant, "is to get to-day three bales of cotton (two from Henry, and one from Nathan), less the rents, and out of the next lot of said Henry and Nathan S. [landlord] is to get two-thirds, provided it does not ex-

ADVANCES TO MAKE CROP—*Continued.*

ceed their indebtedness to him for the year 1881, and so on until both claims are settled;" the lien for rent is expressly reserved and retained on the three bales delivered to the merchant, and the landlord's lien for advances is, by necessary implication, abandoned as to those bales; while, as to the residue of the bales raised by the tenants named, two-thirds thereof is made subject to his claim for rent and advances, but only during the year 1881. *Coleman v. Siler*, 435.

3. *Waiver of landlord's lien for advances.*—When a landlord agrees and promises, by letter addressed to a merchant, not to make any advances to his tenants if the merchant will furnish them with supplies, this necessarily postpones and subordinates his lien for any advances afterwards made to them, to the merchant's lien for advances made on the faith of the letter; and in a controversy between him and a purchaser from the merchant, he can not claim to appropriate any part of the proceeds of sale of the tenant's crop to his lien for such advances, until the merchant's lien is fully paid and satisfied. *Ib.* 435.
4. *Contract between landlord and merchant furnishing supplies to tenants; respective rights and liens under.*—If a merchant agrees and promises, at the instance of the landlord, to make statutory advances to his tenants to a specified amount; and the landlord, in consideration thereof, agrees to be responsible for the debt, and transfers his rent contracts as collateral security for its payment; the merchant can not enforce this obligation, when it is shown that he failed to furnish supplies to the full amount specified; but, if he complied fully with his undertaking, he would be entitled to payment out of the crops, in preference to the landlord's claim for rents. *Foster v. Napier*, 393.

ADVERSE POSSESSION.

1. *As between tenant for life (or purchaser from him) and remainder-man.*—The possession of land by a tenant for life can not be adverse to the remainder-man; and if he sells and conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not, and can not be during the continuance of the life-estate, adverse to the remainder-man. *Pickett v. Pope*, 122.
2. *Permanent improvements by adverse possessor.*—"Adverse possession," as the words are used in the statute which gives to the defendant in ejectment, or the statutory action in the nature of ejectment, the right to suggest upon the record that he and those whose possession he has "have had adverse possession" for three years before the commencement of the suit, and have erected permanent improvements on the land (Code, §§ 2951-54), "must be construed to mean just the same character of hostile possession as will put in operation the statute of limitations, except that it must be *bona fide* under color or claim of title;" and a purchaser from the tenant for life, though his deed purports to convey the absolute property, can not claim the benefit of the statute, in an action brought by the remainder-man within three years after the death of the tenant for life. *Ib.* 122.
3. *Statute of limitations, and adverse possession, as between trustee and beneficiaries.*—The statutes of limitation do not apply to express trusts, which are peculiarly and exclusively the subjects of equity jurisdiction; the possession of the trustee being considered the possession of the *cestui que trust*, and not becoming adverse until there has been an open disavowal of the trust, brought home to the knowledge of the beneficiary with unquestionable certainty; and such a trust is only barred, on the doctrine of prescription, by the lapse of twenty years. *McCarthy v. McCarthy*, 546.

AGENCY.

1. *Power of attorney to confess judgment as surety for fine and costs.*—A writing, addressed to the sheriff, in these words: "I propose to go on J. M.'s security for costs and fine, in case he is convicted, jointly with B. R.,"—is not, *it seems*, sufficiently definite and specific as a power of attorney to authorize a judgment by confession against the writer, jointly with B. R., for the fine and costs imposed on J. M. *Giddens v. Crenshaw County*, 471.
2. *Declarations of agent; when admissible against principal.*—The admissions or declarations of an agent, relating to the business of the agency, and made while negotiating in reference to it, are admissible as evidence against his principal. *Belmont Coal & R. R. Co. v. Smith*, 206.
3. *Sale by agent.*—Authority to an agent to sell personal property, only authorizes him to sell for money; and if he sells in satisfaction of his own debt, no rights are conferred or acquired by the sale, but he and the purchaser are guilty of a joint conversion. *Coleman v. Siler*, 435.

ALIBI. See CRIMINAL LAW, 57-8.

AMENDMENT.

1. *Amendment of complaint.*—The introduction of a new cause of action, by an amended count, is a departure from the original complaint, and is not allowable. *Mobile Life Ins. Co. v. Randall*, 170.
2. *Same.*—A recovery can not be had under the common money counts, for the proceeds of cotton sold after the commencement of the suit, although they were added to the complaint by amendment subsequent to the sale. *Graham v. Myers & Co.*, 432.
3. *Substitution of complaint.*—A complaint may be substituted, when the original has been lost or mislaid, on proof of the correctness of the substitute and its substantial correspondence with the original; and a difference between the two in the description of the land sued for is no objection to the allowance of the substitute, when there is no dispute as to the identity of the land in controversy. *Pickett v. Pope*, 122.
4. *Amendment of judgment against garnishee, nunc pro tunc, by reciting judgment against defendant.*—Re-affirming the decision made in this case at the last term, the court holds that, in the entry of a final judgment against a garnishee, it is the duty of the clerk to make it recite the fact and amount of the original judgment against the debtor; and that his failure to do so is a clerical error, which may be corrected by amendment, *nunc pro tunc*, at a subsequent term. *M. & C. Railroad Co. v. Whorley*, 264.
5. *Same; when appeal lies.*—Although the rendition or amendment of a judgment *nunc pro tunc* is the correction of a mere clerical error or misprision, an appeal lies from the order or judgment allowing it. *Ib.* 264.

ARBITRATION.

1. *Award, as evidence of title to land.*—When a pending suit, involving the title to land, or the right of possession for a term not yet expired, is submitted to arbitration, the award rendered, though it can not have the operation and effect of a conveyance of lands, is evidence of title, which will support or defeat an action of ejectment, or a statutory action in the nature of ejectment; but, when set up by the defendant, it is only matter of evidence, available under the plea of not guilty, is open to contestation, and must be determined by the jury, unless a trial by jury is waived. *Moore v. Helms*, 368.

ASSAULT AND BATTERY. See CRIMINAL LAW, 6, 7.

ASSIGNMENT.

1. *Assignment of lease; variance.*—In an action for rent reserved by a written lease, a sole plaintiff suing as the assignee, a recovery can not be had on proof of an assignment to a partnership of which he is a member. *McMillan v. Otis*, 560.
2. *Assignment of judgment.*—An action on a judgment, which has been assigned, is properly brought in the name of the original plaintiff, and revived in the name of his personal representative. *Wolffe v. Eberlein*, 99.
3. *Promise to assignor, or his agent, for benefit of assignee.*—A new promise to pay a debt which, after having been reduced to judgment, was barred by a discharge in bankruptcy, if made to the plaintiff in the judgment, or to his agent, enures to the benefit of the assignee, and will support an action on the judgment for his benefit. *Ib.* 99.
4. *Assignment by insolvent debtor, giving preference to individual over partnership creditors.*—An insolvent debtor, in making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts. *Evans, Fite, Porter & Co. v. Winston*, 349.
5. *General assignment.*—A sale of his entire stock of goods by an embarrassed or insolvent debtor to one of his creditors, in satisfaction of a debt admitted to be valid, is not fraudulent as against other creditors, when there is no secret trust or reservation of a benefit to the debtor; nor can such a conveyance be declared and enforced as a general assignment at the instance of the other creditors. *Heyer Brothers v. Bromberg Brothers*, 524.
6. *Assignment of notes for purchase-money; priority of lien, as between assignees and assignor.*—Several notes being given for the purchase-money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after the assigned notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court. *Preston & Co. v. Ellington*, 133.
7. *Same; rights of assignee by delivery merely.* *Ib.* 133; also, *Daily's Adm'r v. Reid*, 415.

ATTACHMENT.

1. *Attachment issued by notary public.*—An attachment sued out before a notary public, who is *ex-officio* a justice of the peace, returnable to the Circuit Court, is void. *Jackson v. Bain*, 528.
2. *Attachment issued by deputy-clerk, who has not taken official oath.* An attachment issued by a deputy-clerk who is performing the duties of the office under appointment by his principal, is not voidable, nor subject to be abated on plea, because he has never taken the official oath prescribed by law; his official acts, like those of any other officer *de facto*, having the same force and effect, so far as the public and third persons are concerned, as the acts of an officer *de jure*. *Joseph v. Cawthorn*, 411.
3. *Lien of attachment, as against mechanic's lien.*—A mechanic's statutory lien for labor performed, or materials furnished, accrues from the time at which the labor is done or commenced, or the materials are furnished (Code, §§ 3440-47); and if the claim is properly filed for record within the time prescribed, followed up by suit

ATTACHMENT—*Continued.*

within ninety days (§ 3454), and prosecuted to judgment without unnecessary delay, the lien is superior to that of an attachment levied on the property subsequent to its accrual, though before the commencement of the suit to enforce it. *Young & Co. v. Stoutz & Co.*, 574.

4. *Same*; when attaching creditor is not made party to suit.—An attachment having been levied on the property after the accrual of the mechanic's lien, the attaching creditor may be made a party to the statutory action for the enforcement of the lien, and he will then be bound by the judgment rendered in that action; but, if he is not made a party, he is not bound by its recitals as to the time when the lien accrued; and the property being sold under executions on the judgments rendered in both cases, and the money brought into court by the sheriff, the records of the two cases being the only evidence before the court, the money is properly awarded to the plaintiff in the attachment case, whose attachment was levied before the mechanic's claim was filed for record. *Ib.* 574.
5. *What may be reached by attachment and garnishment.*—When a promissory note is taken for money loaned, whether payable to the wife directly, or to the husband as her agent, a creditor of the husband can not reach and subject any part of the debt, by garnishment against the maker of the note, because a part of the money arose from the separate earnings of the wife, and were mingled with other moneys belonging to her statutory estate. *Flournoy & Epping v. Owens*, 446.
6. *Amendment of judgment against garnishee, nunc pro tunc, by reciting judgment against defendant.*—Re-affirming the decision made in this case at the last term, the court holds that, in the entry of a final judgment against a garnishee, it is the duty of the clerk to make it recite the fact and amount of the original judgment against the debtor; and that his failure to do so is a clerical error, which may be corrected by amendment, *nunc pro tunc*, at a subsequent term. *M. & C. Railroad Co. v. Whorley*, 264.

ATTORNEY AT LAW.

1. *Attorney's lien on judgment or decree.*—As a general rule, an attorney or solicitor has a lien on a judgment or decree obtained by him for his client, to the extent of reasonable compensation for services rendered and disbursements made in the particular case; he being regarded, to this extent, as an equitable assignee of the judgment or decree from the day of its rendition, and entitled to protection against collusive dealings between his client and the adversary party; but the lien extends no further, and it is subordinate and inferior to the right of set-off, as against the client, of all existing debts or demands, the subject of set-off at the time the judgment or decree was rendered. *Mosely & Ely v. Norman*, 422.
2. *Same*; conflicting claims of attorney and creditor, to judgment in favor of administrator.—An administrator and guardian having contracted debts for the benefit of his wards, the distributees, and, on final settlement of his accounts under a bill filed by him, having been allowed a credit for the amount of the accounts, on the production of the creditor's receipt, and thereby obtained a decree against the estate for that amount; and it being shown that the receipt was given under an agreement that the decree should enure to the benefit of the creditor, that the allowance of the credit was not contested, and that the trustee was insolvent; *held*, that the court, giving effect to the agreement, would uphold an assignment of the decree to the creditor, against the lien of the attorney and solicitor for services rendered in the settlement. *Ib.* 422.

ATTORNEY AT LAW—*Continued.*

3. *Attorney's fees*; when recoverable as damages. *Foster v. Napier*, 393; *Washington v. Timberlake*, 259.
4. *Argument of counsel to jury*.—While great latitude must be allowed to counsel in addressing a jury, in the matter of drawing inferences from proven facts, facts must not be stated as facts, when there is no proof whatever of them, and any proof of them would not be legitimate evidence. *Wolffe v. Minnis*, 386.
5. *Same*; *duty of court in restraining*.—It is the duty of the court to interfere, *ex mero motu*, and arrest counsel who go beyond the limits of legitimate argument; and when objection is duly interposed to the improper language used, the court should instruct the jury in plain terms, that the remarks are not legitimate argument, and must not be considered by them for any purpose. It is not enough that the counsel himself, on objection being made, withdraws his remarks, by saying "Oh, well, I'll take it back." *Ib.* 386.
6. *Same*.—Under the rule laid down in the case of *Cross v. The State* (68 Ala. 476), as to unauthorized statements by counsel in their argument to the jury, which would be available on error, "the statement must be made as of fact, and the fact stated must be unsupported by any evidence." But the court, in laying down this rule, did not intend "to shackle discussion, nor to scrutinize narrowly and strictly inferences counsel may draw from proven facts;" and the rule does not apply to a statement made as an inference from the testimony, which falls within the legitimate line of argument. *Hobbs v. The State*, 39.
7. *Same*.—As to the latitude allowed counsel in this case, in his argument to the jury, which was excepted to, "the most that can be said is, that he has taken great latitude in deducing questionable inferences from facts already in evidence;" but the case is not brought within the rule laid down in the case of *Cross v. The State* (68 Ala. 476), the enforcement of which must necessarily be regulated, to a large extent, by the sound discretion and good judgment of the primary court. *Motes v. Bates*, 374.

BANKRUPTCY.

1. *Debt discharged by bankruptcy*; *how declared on*.—When a subsequent promise is made to pay a debt which has been barred by a discharge in bankruptcy, the creditor may sue directly on the new promise, or, at his election, on the original debt, and reply the new promise to a plea setting up the discharge in bankruptcy; and if the original debt was reduced to judgment before the new promise was made, he may sue on the judgment. *Wolffe v. Eberlien*, 99.

BILL OF EXCEPTIONS.

1. *Sufficiency of exception*.—It is the office of a bill of exceptions to point out, clearly and distinctly, the error of which the party complains; and a general exception to several rulings, one of which is free from error, or which are only objectionable in part, will not be sustained. *Robertson v. Black*, 322.
2. *Exception to exclusion of evidence*; *presumption in favor of judgment*.—When an exception is reserved to the exclusion of evidence, which is not set out, and the relevancy and materiality of which are not shown, this court will presume that it was properly rejected. *Perry v. Danner & Co.*, 485.
3. *Nonsuit, with bill of exceptions*.—Under the settled construction of the statute (Code, § 3112), a voluntary nonsuit, taken in consequence of an adverse ruling on demurrer, not being a matter to which a bill of exceptions can properly be taken, is not revisable. *Ib.* 485.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Promissory note for rent ; stipulation by payee to save maker harmless against claim of third person.*—Where a promissory note, given for the payment of rent, recites that the payee "agrees to save harmless" the makers against the claim of W., from whom they had also rented the premises, and to whom they had executed a note; if the makers voluntarily pay the claim of W., they can not make the payment available as a defense against the note, without proving affirmatively that defense against it would have been unavailing. *Belmont Coal & R. R. Co. v. Smith*, 206.
2. *Estoppel en pais against maker of note.*—If a person who is about to purchase, or take an assignment of a promissory note, applies to the maker for information, is assured by him that there is no defense against it, and buys the note on the faith of that representation, the maker is estopped from setting up against him any defense which then existed. *Wilkinson v. Searcy*, 243.
3. *Parol evidence varying indorsement.*—An indorsement of a promissory note is a contract of defined legal operation and effect, and can not be varied by proof of a contemporaneous verbal agreement between the parties, not incorporated in it. *Preston & Co. v. Ellington*, 133.
4. *Assignment of notes for purchase-money ; priority of lien, as between assignees and assignor.*—Several notes being given for the purchase-money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after the assigned notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court. *Ib.* 133.

BONDS.

1. *Appeal bond ; what damages are recoverable.*—An appeal bond, given in pursuance of the order of the presiding judge (Code, § 3928), on appeal from a judgment for the recovery of land or the possession thereof, and conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers all damages resulting to the plaintiff from the appeal and its legal consequences and incidents; that is, all damages of which the appeal is the moving cause, or the direct and immediate agency producing them; and this includes the value of the use and occupation of the premises pending the appeal, of which the plaintiff was deprived by the suspension of a writ of possession on the judgment. *Cahall v. Mutual Building Association*, 539.
2. *Same ; to whom payable.*—When an appeal bond, in a chancery case, is made payable to the register, instead of the appellee, a judgment for costs can not be rendered against the sureties, on an affirmance, the only remedy against them being by action on the bond. *The State v. City Council of Montgomery*, 226.
3. *Construction of title-bond.*—Under a stipulation in a bond for title, by which the vendor agrees, if the purchaser "should die before the last payment is made, and his wife is not able to pay the land out, to allot to her, by disinterested parties, the value of whatever amount has been paid on said land according to the within agreement," the right of the purchaser's widow to an allotment of the land *pro tanto* is dependent upon his death without having made the last payment, and is not restricted to the contingency of his death before the day appointed for the last payment and its non-payment on or before that day. *Simpson v. Williams*, 344.

BONDS—*Continued.*

4. *Variance in description of bond.*—In an action on an injunction bond, brought by T. as sole plaintiff, the complaint averring that the condition of the bond was that the obligors "would pay plaintiff all such damages as he may sustain by the suing out of said injunction," and that they have failed "to pay him the damages he has sustained;" a bond payable to B. and T. jointly, and conditioned to pay them the damages they might sustain, is not admissible as evidence, the variance being material and fatal. *Washington v. Timberlake*, 259.
5. *Injunction bond, with condition awkwardly expressed.*—An injunction bond, the condition of which is that, if the obligors shall pay the obligees "all damages they may sustain by the suing out of said injunction, if the same is dissolved, then this obligation to remain in full force and effect," though awkwardly expressed, is not void. *Ib.* 259.
6. *Municipal bonds in aid of railroad; injunction of tax to pay interest on.*—The corporate authorities of the city of Montgomery having been authorized, by special statute, to submit to a vote of the citizens the question of granting aid to the South and North Alabama Railroad Company, on the terms agreed on between the said corporate authorities and the directors of the railroad company, and to issue city bonds in aid of the railroad, if the election resulted in favor of subscription; the issue and negotiation of the city bonds might be enjoined, at the suit of individual citizens and tax-payers, on the grounds that a majority of those voting at the election did not in fact vote in favor of subscription, and that the propositions voted on were afterwards changed, to the detriment of the city, by agreement between the city authorities and the railroad directors, "if these facts had been shown at the proper time;" but, the bonds having been issued, being regular on their face, negotiable in form, and having passed into the hands of third persons, as purchasers for value, who are not charged with knowledge or notice of any irregularity in their issue, as against them such irregularities avail nothing, and the tax-payers can not enjoin the collection of a municipal tax levied to pay the interest on them. *The State v. City Council of Montgomery*, 226.
7. *Burden of proof as to notice.*—As against the holders of negotiable municipal bonds, an averment of notice of irregularities in their issue which would invalidate them, though necessary in a bill which seeks to enjoin their collection, is negative in its character, and does not impose on the complainants the *onus* of proving notice. *Ib.* 226.
8. *Detinue bond; what damages are recoverable.*—In an action on a statutory bond given by the plaintiff in detinue (Code, § 2942), attorney's fees, and costs incurred in that suit (if not previously recovered), as well as any damages actually sustained from the seizure and detention of the property, are legitimate subjects of recovery; but loss of time, and hotel bills paid, while engaged in procuring sureties on the replevin bond, or in attendance on the trial, are too remote and variable. *Foster v. Napier*, 393.

BRIBERY. See CRIMINAL LAW, 8-10.

CHANCERY.

JURISDICTION, AND GENERAL PRINCIPLES.

1. *When creditor without lien may come into equity, to set aside sale or conveyance on ground of fraud.*—The statute authorizing a creditor without a lien to file a bill in equity, "to subject to the payment

CHANCERY—*Continued.*

of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor" (Code, § 3886), is not confined to cases in which a discovery is sought; nor is it necessary that the bill shall ask a discovery, or conform to the requisites of a bill for discovery. *Zelnicker v. Brigham & Co.*, 598.

2. *Deed constructively fraudulent, but standing as security for indemnity of grantee; liability for rents, and allowance for improvements and taxes.*—A conveyance being held constructively fraudulent at the suit of creditors, but allowed to stand as a valid security for the reimbursement or indemnity of the grantee, to the extent of the consideration actually paid; on the statement of the account, he is chargeable with rents during his possession, and is entitled to a credit for the value of permanent improvements erected by him before (but not after) the filing of the bill, and for all taxes paid, whether before or after the bill was filed. *Gordon, Rankin & Co. v. Tweedy*, 232.
3. *As to set-off of permanent improvements, against rents.*—The right to set off the value of permanent improvements, in reduction or recoupment of rents, is purely equitable, and is only allowed in favor of a *bona fide* occupant or possessor of land; actual notice of the assertion of a superior title is fatal to the occupant's claim for improvements, and the filing of a bill against him, by the person claiming such superior title, is the most solemn and authoritative form of notice. *Ib.* 232.
4. *Injunction of judgment in unlawful detainer, but not writ of restitution.*—The unsuccessful defendant in an action of unlawful detainer, having taken an appeal to the Circuit Court, and then filed a bill in equity to correct an alleged mistake in his lease, may restrain the further prosecution of the action at law until the determination of the suit in equity; but, not having given a *super-sedeas* bond (Code, § 3711), the issue of a writ of restitution on the judgment will not be enjoined in the meantime. *Robbins v. Battle House Company*, 499.
5. *Fraud, as ground of equitable relief against judgment.*—The general rule is, that a court of equity will vacate and set aside a judgment at law, on the ground of fraud, *only* when the fraud was practiced in the rendition or procurement of the judgment itself; that fraud in antecedent transactions, not connected with the proceedings in the cause, and which would merely have constituted a good defense to the action, is not sufficient; and that the fraud must be actual and positive—utterly repugnant to honest intentions. *Noble v. Moses Brothers*, 604.
6. *Accident, mistake and fraud, as grounds of equitable relief against judgment.*—When there was no fraud in the act of obtaining or procuring the judgment, but equitable relief against it is sought on grounds which go to the merits of the original action, and which would have been available as a defense at law, the complainant is required to allege and prove, 1st, that he has a good and meritorious defense to the cause of action, or so much thereof as he proposes to litigate; 2d, that his failure to defend at law was not attributable to his own omission, fault, or neglect; and, 3d, that it was attributable to fraud, surprise, accident, or some act of his adversary, the plaintiff at law. *Ib.* 604.
7. *Transactions between parent and child; equitable relief against.* Business transactions between a father and his unmarried daughter, whose guardian he had been until she attained her majority, and who then continued to reside in his household as a member of his family, will be scrutinized with watchful jealousy by a court of equity, and will not be permitted to stand, when it appears that,

CHANCERY—*Continued.*

by the exercise of undue influence, the father obtained an improper benefit or advantage; and his failure to make a full disclosure of all material facts affecting his dealings with her, as between other persons occupying a fiduciary relation toward each other, would authorize the court to set aside such transactions, at the option of the daughter seasonably expressed. *Ib.* 604.

8. *Same; dealings of father, as agent, with third persons.*—This principle can not be applied to third persons, who dealt with the father as agent of his daughter, advancing large sums of money to enable him to carry on farming operations in her name, and in whose favor the daughter, having executed a mortgage to secure such advances, afterwards confessed a judgment for the large balance due; when the evidence shows that the father was ruinously insolvent, and carried on his business operations, though nominally as agent of his daughter, really in secret trust for the benefit of himself and his family; and that the daughter knowingly lent him her credit, signed promissory notes for his indebtedness, on accounts furnished to him and admitted by him to be correct, and confessed the judgment for the amount of these notes. The plaintiffs in the judgment, in their dealings with the father, as shown by the evidence, having acted with the utmost fairness, good faith, and liberal indulgence, they are not chargeable with fraud on account of the fiduciary relation existing between the father and daughter, and his failure to make a full disclosure to her of all material facts connected with his said business transactions. *Ib.* 604.
9. *Interpleader; when bill does not lie.*—When mortgaged lands are sold and conveyed by the mortgagor, by deed with covenants of warranty, the purchaser paying part of the price in cash, and giving his note for the residue; if the note secured by the mortgage and the note for the unpaid purchase-money are afterwards transferred to different persons, the purchaser can not maintain a bill of interpleader against them. *Wilkinson v. Searcy*, 243.
10. *When widow, claiming exempt personal property, may come into equity.* "The court will not say there may not be cases in which equity would interfere, at the instance of the widow, to enable her to make her selection of exempt personal property and have it made available;" but, when her bill fails to show any remissness, undue delay, or other dereliction of duty on the part of the administrator, it is without equity. *Loeb & Weil v. Richardson*, 312.
11. *Removal of disabilities of coverture, by decree of chancellor; sufficiency of petition.*—To authorize and sustain a decree by the chancellor, in the exercise of his statutory jurisdiction (Code, § 2731), relieving a married woman of the disabilities of coverture as to her statutory or other separate estate, "so far as to invest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *femme sole*," her petition (or application) must aver that she has a separate estate, statutory or equitable; and the want of such an averment, it being a jurisdictional fact, renders the decree void. *Stoutz v. Burke*, 530.
12. *Equitable estate of married woman; priority of liens among creditors.* In charging the equitable estate of a married woman with her contracts and engagements, a court of equity does not proceed on the theory that they are valid and operative as appointments or appropriations by her of so much of her estate as may be necessary to satisfy them, but on the principle of her presumed intention to do a valid act, and therefore to charge the estate which she has full capacity to charge: but her contracts do not create a lien or charge on any specific property, such as is created by the filing of a bill in equity; and when bills are filed by several creditors,

CHANCERY—*Continued.*

- seeking to charge and condemn the same property, the priority of their liens is determined by the time when their respective bills were filed, and not by the time when their debts were created. *Masson v. Turner*, 513.
13. *Marshalling assets between individual and partnership creditors.* Partnership creditors can assert no lien on partnership property, for the payment of their debts; though such lien may be worked out for their benefit, by a partner asserting his right to have the partnership effects applied to the extinguishment of the partnership liabilities; and a court of equity, in administering the effects of an insolvent partnership, will apply them primarily to the payment of partnership debts, while the separate property of the individual partners will be devoted primarily to the payment of their individual debts. *Erans, Fite, Porter & Co. v. Winston*, 349.
 14. *Marshalling securities between creditors.*—Where an entire tract of land is conveyed by deed of trust for the indemnity of the grantor's sureties, and, an execution of junior lien being afterwards levied on it, the grantor asserts a right of homestead exemption to a part; the plaintiff in execution, becoming the purchaser at his own sale, has a right to insist that the land claimed as exempt shall be first subjected to the payment of the debt for which the sureties are bound, and against which they are indemnified by the deed. *Cochran v. Miller*, 51.
 15. *Purchase by mortgagee at sale under mortgage; election and remedies of mortgagor.*—When lands are sold under a power contained in a mortgage, and the mortgagee himself becomes the purchaser at the sale, the mortgagor has an election, if seasonably expressed, either to affirm or disaffirm the sale, without regard to its fairness, or to the sufficiency of the price paid; but a bill which merely seeks to set aside the sale, alleging nothing as to the state of the account, containing no tender or offer to pay what is due, or to do equity, and not asking to redeem, is without equity. *Garland v. Watson*, 323.
 16. *Partition of lands; jurisdiction of equity, as affected by statutory provisions.*—The original jurisdiction of a court of equity to decree partition of lands between co-partners, joint tenants, and tenants in common, is not taken away by the statutory jurisdiction conferred on the probate judge (Code, §§ 3497-3513); but, if the judge of probate first acquires jurisdiction, by the filing of a proper petition, a court of equity will not interfere with its exercise, unless facts or circumstances of special equitable cognizance are shown, which render inadequate the statutory jurisdiction. *Wilkinson v. Stuart*, 198.
 17. *Sale of lands for division; jurisdiction of equity, and of probate judge.*—When lands are held by joint tenants, or tenants in common, who are adults, a court of equity has no jurisdiction to decree a sale in order to effect an equitable division, except by consent; but statutory jurisdiction for this purpose has been conferred on the judge of probate (Code, §§ 3514-20), and it is exclusive as to adult parties; yet, when a petition has been filed before him, asking a sale on that ground, a court of equity may interfere, at the instance of the defendants, and decree an equitable partition without a sale. *Ib.* 198.
 18. *Erection of valuable improvements by tenant in common.*—If one tenant in common of lands erects valuable improvements thereon, with the express authority, or knowledge and implied consent of his co-tenant, a court of equity will, in directing partition, give him the benefit of his improvements, by assigning to him that part of the lands on which they are situated; and the claim for such improvements gives a court of equity jurisdiction to enjoin, at his

CHANCERY—*Continued.*

- instance, proceedings before the probate judge asking a sale for division. *Ib.* 198.
19. *Rents and profits, for use and occupation, as between tenants in common.*—If one tenant in common use and occupy a portion of the lands, his entry and possession not being hostile to his co-tenant, he is not liable to account for rents and profits; and hence, when asking an equitable partition, and an allowance for the value of improvements erected by him, it is not necessary that he should offer in his bill to pay for his use and occupation. *Ib.* 198.
 20. *Partition of lands held in remainder, or of part only.*—In the absence of statutory provisions, partition can not be awarded, either at law or in equity, of an estate held in remainder or reversion; nor, as a general rule, will partition be awarded of part only of an entire estate, which would be splitting an entire cause of action; yet, where the lands consist of several distinct tracts, held under the same conveyance, an outstanding life-estate in one tract is no obstacle to a partition of the others. *Ib.* 198.
 21. *Appointment of commissioners to make partition.*—In making partition in equity, the usual practice is to issue a commission to disinterested freeholders, giving them proper instructions; and if the parties do not agree upon and nominate persons for appointment, a reference to the register is ordered to ascertain and report the names of suitable persons; but an irregularity in the appointment of commissioners, to which no objection is made before the chancellor, is waived. *Ib.* 198.
 22. *Reformation of deed, on ground of mistake.*—An erroneous opinion as the legal effect and operation of a conveyance, developed by events subsequent to its execution, is a mistake of law, and furnishes no ground for a reformation of the deed. *Kelly v. Turner*, 513.
 23. *Same; sufficiency of evidence.*—A court of equity will not decree the reformation of a written instrument on the ground of mistake, on parol evidence only, unless the mistake is plain, and is clearly established by full and satisfactory proof. *Marsh v. Marsh*, 418.
 24. *Reformation of writing on ground of mistake; previous request and refusal to correct.*—Where the alleged mistake is disputed by the defendant, or where a request to correct it would have been vain and useless, a bill in equity may be maintained without alleging such previous request and refusal; and the court, doubting the correctness of the rule laid down in *Long v. Brown* (4 Ala. 622), which was followed in *Beck v. Simmons* (7 Ala. 71), and *Lumkin v. Reese* (7 Ala. 170), "submits if it is not a much better rule, in all such cases, to retain the bill until the correction is made, and if the bill was filed without previous request, and unnecessarily, let the costs be taxed against the complainant." *Robbins v. Battle House Company*, 499.
 25. *Answer construed, as to admission of mistake and offer to correct.* These averments, in an answer to a bill for the reformation of an alleged mistake in a written lease: "Defendant has never refused to reform said lease, and to make the necessary correction in it, and alleges that no application was ever made to respondent by complainant to do so, and that he would, at any time, if applied to, have corrected any mistake in said lease, and is still ready and willing to do so, if applied to by complainant,"—fall very far short of admitting the alleged mistake, and offering to correct it. *Ib.* 499.
 26. *Reformation of mortgage as against subsequent judgment creditors.* The statutes of registration, for the protection of judgment creditors against unrecorded conveyances (Code, §§ 2166-7), relate only to conveyances of the legal estate in lands, and have no applica-

CHANCERY—*Continued.*

- tion to mere equitable estates or interests, which are not subject to the lien of executions or judgments, and are not within the policy of the statutes; and there is nothing in the statutes which, as in favor of judgment creditors, forbids the reformation of a recorded mortgage by a court of equity, so as to make it include lands which were omitted by mistake. *Bailey, Davis & Co. v. Timberlake*, 221.
27. *Protection to bona fide purchaser without notice.*—A *bona fide* purchaser for valuable consideration is entitled to protection against all latent equities of which he had no notice, whether he purchased under contract with the holder of the legal title, or at a sale under execution against him; but, whether a judgment creditor, purchasing at a sale under his own execution, and paying the price bid by entering satisfaction of his judgment, is entitled to protection as a *bona fide* purchaser for valuable consideration, is a question as to which there is some conflict of authority, and which does not arise in this case, the sale under execution being a nullity. *Ib.* 221.
28. *Redemption and account.*—Where the children of the mortgagor, claiming as subsequent purchasers from him, file a bill against the mortgagee and purchasers at a sale under the mortgage, alleging fraud and oppression practiced by the mortgagee in the matter of the accounts, and asking an account and redemption, "they must allege the true state of the account between the mortgagor and mortgagee—that is, must allege the amount claimed by the mortgagee, and the amount admitted by the mortgagor, or show the several items contested between them." General averments that the balance due, if any, was inconsiderable, and that the purchasers bought with knowledge of the true state of the account, are not sufficiently certain and definite. *Conner & Wife v. Smith*, 115.
29. *Setting aside sale under execution; remedy at law, and in equity.* When a sale of lands under execution at law is impeached, because of mere error in the process, or on account of some error attending its execution, the court from which the process issued has exclusive jurisdiction to set aside the sale; but, if fraud or illegality attends the sale, or it has been followed by the execution of a conveyance casting a cloud upon the title, a court of equity has jurisdiction concurrent with the court of law to set it aside. *Cowan & Co. v. Sapp*, 44.
30. *Same, on ground that judgment was in fact satisfied.*—If the judgment was in fact satisfied at the time of the sale under execution, the court from which the process issued has undoubted jurisdiction to set aside the sale; but, if the process is regular on its face, and the sale is followed by a regular conveyance to the plaintiff in execution as the purchaser, the fact of payment resting in parol, a court of equity will intervene, at the instance of the defendant in possession, set aside the sale, and cancel the conveyance as a cloud on the title. *Ib.* 44.
31. *Same; diligence required of plaintiff.*—A party who seeks to set aside a sale under legal process, whether by motion in the court from which the process issued, or by bill in equity, must act promptly, or must satisfactorily explain any unreasonable delay; but no time can be definitely fixed, within which the application must be made, since the proceeding is of an equitable nature, dependent upon equitable principles, and necessarily governed by the varying facts of each particular case. (Doubting the correctness of the general rule declared in *Abercrombie v. Conner*, 10 Ala. 296.) *Ib.* 44.
32. *Same.*—In this case, more than three years after the sale having elapsed before the bill was filed to set it aside, the delay was held sufficiently explained by proof of the facts, that the payment of

CHANCERY—Continued.

- the judgment was made to the plaintiff in Nashville, Tennessee, on the same day the land was here sold under execution, and that he made no effort to recover possession, as purchaser at the sale, until about six months before the bill was filed. *Ib.* 44.
33. *Specific performance ; when refused.*—A court of equity will not decree the specific performance of a contract, when the allegations of the bill are not established by clear and definite proof, or where the evidence is left in doubt and uncertainty. *Goodlett v. Kelly*, 213.
34. *Specific execution of imperfect instruments.*—When a written instrument, intended as a conveyance, is defective in some particular essential to pass the legal title,—as the attestation of a subscribing witness, or a proper acknowledgment,—a court of equity will regard it as an agreement to convey, and will decree a specific execution of it, if the person executing it was *sui juris*; but, to authorize such decree, the instrument must be founded on a valuable consideration, and must be strictly equitable. *Roney v. Moss*, 390.
35. *Same; consideration and recitals of mortgage.*—When the instrument, a specific execution of which is sought, is in the form of a mortgage to secure the payment of a debt particularly described, its recitals are *prima facie* evidence of the existence of the debt, and cast on the mortgagor the *onus* of disproving them; but, the evidence in this case clearly showing that the debt had been in fact paid, the presumption is rebutted, and a specific execution properly refused. *Ib.* 390.
36. *Approval of voluntary act which court would have compelled.*—A court of equity often regards that as done which ought to have been done; and when the parties voluntarily agree to do that which the court would compel them to do, the court will uphold and give effect to the agreement. *Moseley & Eley v. Norman*, 422.
37. *Subrogation of creditor to mortgage security.*—The lender of money which is used in paying off a mortgage, or other incumbrance on land, is not entitled, on that account alone, to be subrogated to the rights of the mortgagee; but, if the money was advanced for the purpose of paying off the mortgage, with the just expectation of obtaining a valid security on the property for the re-payment, and it was used in paying off the mortgage; or, if the mortgage given for its re-payment is defective, or the money used in paying off the mortgage debt was procured by fraud and misrepresentation—in these cases, the lender is entitled to be subrogated to the security of the mortgage which his money has discharged. *Bolman v. Lobman*, 507.
38. *Subrogation of creditor to rights of trustee against trust estate.*—The contracts of guardians, administrators, or other trustees, though made in execution of the trust, and in the performance of a legal duty, impose upon them a personal liability, and create no liability against either the trust estate or the beneficiaries; but, if the estate is indebted to the trustee on settlement of his accounts, and he is insolvent, as shown by the exhaustion of legal remedies against him, and the contract has enured to the benefit of the trust estate or its beneficiaries, a court of equity will subrogate the creditor to his rights against the estate. *Moseley & Eley v. Norman*, 422.
39. *When deed of trust may be enforced by beneficiaries ; amended and supplemental bills.*—Sureties on a *supersedeas* bond, for whose indemnity a deed of trust has been executed by their principal, may file a bill to foreclose the deed so soon as the judgment is affirmed, and are not required to first pay it themselves; and if they pay the judgment pending the suit, thereby becoming themselves entitled to the proceeds of sale (which the bill prayed might be paid to the

CHANCERY—*Continued.*

- creditor), this is supplemental matter, which may be brought in by amendment; and the failure to bring it forward is a mere irregularity, which does not affect the validity of the final decree. *Cochran v. Miller*, 51.
40. *Testamentary trusts; jurisdiction of Probate and Chancery Courts.* The Probate Court has no jurisdiction to enforce and settle a trust created by will; but, when such trust is conferred upon the executor, and distinct executorial duties are also devolved upon him by the will, that court, while declining to take cognizance of the trust, may settle all matters which pertain only to the executorial duties and office; unless the duties of the trust are attached to the executorial office or character, and are so inseparably blended and mingled with the executorial duties that they can not be distinguished from each other; in which case, if the trustee has accepted and undertaken the duties of the trust, the Probate Court has no jurisdiction to execute the will, and the parties will be remitted to the Chancery Court. *Hinson v. Williamson*, 180.
41. *When creditor may maintain bill against administrator and heirs of deceased debtor, without exhausting legal remedies.*—A creditor can not, in the absence of some special equity, maintain a bill in equity to reach and subject the lands of his deceased debtor, until he has exhausted his legal remedies by a judgment at law against the administrator, and the return of an execution unsatisfied against him and his sureties; but this principle does not apply to a bill filed by the beneficiary of an express trust, against the administrator and heirs of the deceased trustee, for an account of rents and profits received. *McCarthy v. McCarthy*, 546.
42. *Loan of money to pay purchase-money of land; rights of lender, as against purchaser's widow.*—A person who lends or advances money to pay the purchase-money for lands, or to pay a decree which the vendor has obtained subjecting the land to sale in satisfaction of his lien, and who takes a mortgage or deed of trust on the lands to secure the repayment of the money, can not claim to be subrogated to the vendor's lien on the land, nor to have the decree revived and enforced in his favor; and the wife of the purchaser not joining with her husband in the execution of the mortgage or deed of trust, her right to dower in the lands is superior to the rights and equities of the lender. *Pettus v. McKinney*, 108.
43. *Abatement of purchase-money.*—When lands are conveyed with covenants of warranty against incumbrances done or suffered by the vendor (Code, § 2193), and are at the time subject to an outstanding mortgage executed by him, this is a breach of his covenants of warranty, which entitles the purchaser to claim an abatement of his note for the unpaid purchase-money, to the extent of the balance due on the mortgage debt, unless his note has been assigned to a third person, and he has estopped himself from setting up that defense against the assignee. *Wilkinson v. Searcy*, 243.
44. *Vendor's lien; when assignee may assert.*—An assignee of a promissory note, given for the purchase-money of land, can not assert a vendor's lien on the land, when the transfer was by delivery merely. (Changed by statute approved Feb. 13, 1879.—Sess. Acts 1878-9, p. 171.) *Daily's Adm'r v. Reid*, 415.
45. *Same.*—Prior to the enactment of the statute approved February 13th, 1879 (Sess. Acts 1878-9, p. 171), the assignment of a promissory note, given for the purchase-money of land, did not pass to the assignee the right to enforce the vendor's equitable lien on the land, when the assignment was of such character that the vendor had no interest in the recovery of the debt, and would not sustain

CHANCERY—Continued.

loss if it remained unpaid; the underlying principle being, that the equitable lien of the vendor was a trust chargeable upon the land for his security and indemnity, when he had taken no independent security for the payment of the purchase-money, because one man ought not to be allowed to get and keep the lands of another without paying the consideration money; and an assignee of the notes was allowed to enforce this lien, on the principle of subrogation, only when such subrogation was necessary for the protection and indemnity of the vendor. *Preston & Co. v. Ellington, 133.*

46. *Same; when vendor is remitted to original lien.*—The vendor's lien, although it did not pass to an assignee by delivery only, was not discharged or extinguished by the assignment; and if he again acquired the notes, he might enforce the lien as if he had never parted with them. *Ib. 133.*
47. *Same; assignment by delivery, and subsequent indorsement without new consideration.*—If the notes are transferred by delivery merely, not imposing on the vendor any liability for their ultimate payment, and not passing to the assignee the right to enforce the equitable lien on the land, a subsequent indorsement or assignment in writing by the vendor requires no new consideration to support it, and clothes the assignee with full capacity to enforce the lien on the land. *Ib. 133.*
48. *Assignment of notes for purchase-money; priority of lien, as between assignees and assignor.*—Several notes being given for the purchase-money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after the assigned notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court. *Preston & Co. v. Ellington, 133.*
49. *Vendor's lien; discharged by novation of contract.*—Where lands were sold by an executor, under authority conferred by a private statute, for the purpose of division and distribution among the parties interested under the will, five of whom became the purchasers, and gave their joint note for the deferred payment; and the sale was reported to the Chancery Court, as required by the statute, and was confirmed; and afterwards, in order to enable the executor to settle with the other devisees and distributees, the purchasers gave him receipts for their distributive shares of the estate, at an agreed valuation, in part payment of the note, and a new joint note for \$2,500, balance of purchase-money in excess of agreed valuation; and he thereupon reported the purchase-money paid in full, executed a conveyance to the purchasers under the order of the court, and charged himself with the purchase-money on final settlement of his accounts; and four of the purchasers paid their proportion of the \$2,500, but the fifth failed to pay any part of her proportion, the arrangement made by her husband for its payment having failed by reason of his misrepresentations to the executor; *held*, that the compromise, or settlement of the original note, was a novation of the contract, and discharged the land which, on subsequent division by agreement among the purchasers, was allotted to the defaulting distributee, from a vendor's lien for the unpaid balance. *Williams v. McCarty, 295.*
50. *Vendor's lien; who may assert, where land has been sold several times.* Where the purchaser of lands agrees, in part payment of the agreed price, to pay his vendor's outstanding note to a third person,

CHANCERY—*Continued.*

which is a lien on the land, and afterwards sells to a sub-purchaser, who makes a similar promise to pay the outstanding note; a payment of the note by such sub-purchaser would extinguish the lien on the land, and the liability of each of the parties; a payment by the purchaser would give him a right to enforce the vendor's lien on the land, as against the sub-purchaser; and a payment by the maker of the note, to whom the first promise to pay it was made, would give him a similar right to enforce the lien; but the latter can not maintain a bill in his own name alone to enforce the lien, when he has not paid the note, although the holder of it has recovered a judgment on it against him. But, on this state of the facts, the holder of the note is a necessary party to the bill, or the several contesting claimants, if there is a dispute as to the ownership of it; and the bill must allege the special facts which show that the maker of the note is remitted to his former right to enforce the lien, else the variance will be fatal to relief. *Young v. Hawkins*, 370.

PLEADING AND PRACTICE.

51. *Amendment of bill; husband and wife as parties.*—When the original bill alleges that the complainant is a widow, and seeks to foreclose a mortgage taken by her in her own name, an amendment may be allowed (Code, § 3156), alleging that she is in fact a married woman, but living separate and apart from her husband, and that he had never sought to exercise any control over her money or property; and on these allegations, the husband is properly joined with the wife as a complainant in the amended bill. *Bolman v. Lobman*, 507.
52. *Multifariousness, and misjoinder.*—A bill is not multifarious because it seeks to foreclose two mortgages on the same property, one of which was given to the complainant for money borrowed to pay off the other, under circumstances which would entitle him to be subrogated to the security of the prior mortgage; and the second mortgage being given by a widow who had only a life-estate in the property, while the first was executed by her and her husband while living, her children being remainder-men under the husband's will, she and her children are properly joined as defendants to the bill, although their interests are separate and distinct. *Ib.* 507.
53. *Parties to bill; joinder of heirs and administrator as defendants.*—When a bill seeks an account of rents and profits received by a deceased trustee, whose estate, though solvent, consists mostly of lands, the heirs are properly joined with the administrator as defendants, being interested in the account; and they may make any defense which would be available to the administrator. *McCarthy v. McCarthy*, 546.
54. *Multifariousness.*—When a bill does not state facts which render it multifarious, the prayer for relief can not render it multifarious. *Ib.* 546.
55. *Same.*—A bill which seeks an account of the mortgage debt, and a redemption of the several lots and parcels of land conveyed by it; and which shows on its face that the several sub-purchasers claim separate and distinct lots, and that one of the lots was not sold under the mortgage, but was bought by the defendant claiming it at a sale under a decree foreclosing an older lien, is multifarious. *Conner & Wife v. Smith*, 115.
56. *Averments of bill for account and redemption.*—Where the children of the mortgagor, claiming as subsequent purchasers from him, file a bill against the mortgagee and purchasers at a sale under

CHANCERY—*Continued.*

the mortgage, alleging fraud and oppression practiced by the mortgagee in the matter of the accounts, and asking an account and redemption, "they must allege the true state of the account between the mortgagor and mortgagee—that is, must allege the amount claimed by the mortgagee, and the amount admitted by the mortgagor, or show the several items contested between them." General averments that the balance due, if any, was inconsiderable, and that the purchasers bought with knowledge of the true state of the account, are not sufficiently certain and definite. *Ib.* 115.

57. *Filing bill in double aspect.*—A bill in equity by creditors who had consented to an extension of their debts, seeking, in one aspect, to set aside as void a sale and conveyance of his goods by the debtor to a creditor who had agreed, if the others would consent to the extension as proposed, that his debt should be postponed until the others were paid, or, in the alternative, to have the conveyance declared and enforced as a general assignment, enuring to the equal benefit of all the creditors under the statute (Code, § 2126), asks measures of relief which are inconsistent and incompatible, and is demurrable on that account. *Heger Brothers v. Bromberg Brothers*, 524.
58. *Amended and supplemental bills.*—When sureties on a *supersedeas* bond, for whose indemnity a deed of trust has been executed by their principal, file a bill to foreclose the deed, and afterwards pay the judgment, thereby becoming themselves entitled to the proceeds of sale (which the bill prayed might be paid to the creditor), this is supplemental matter, which may be brought in by amendment; and the failure to bring it forward is a mere irregularity, which does not affect the validity of the final decree. *Cochran v. Miller*, 50.
59. *Cross-bill; when relief may be granted under, though original bill be dismissed.*—The general rule is, that when the original bill is dismissed, the cross-bill goes out with it, at least when the subject-matter of the cross-bill is simply defensive of the case made by the original bill; but, when the cross-bill sets up, as it may, additional facts relating to the same subject-matter, but not alleged in the original bill, prays for affirmative relief in reference to it, and presents a case of equitable cognizance, the dismissal of the original bill does not dispose of the cross-bill: it is the duty of the chancellor in such case, while dismissing the original bill, to grant such relief under the cross-bill as would be proper, under its averments and the proof, if it were an original bill. *Wilkinson v. Roper*, 140.
60. *Same; extent of relief in this case.*—The original bill seeking an account and redemption of lands mortgaged by the complainant to the defendant, as alleged, to secure the payment of the agreed purchase-money, and failing in this aspect, because the proof showed that the contract between the parties was not a sale and conveyance, with re-conveyance by mortgage to secure the payment of the purchase-money, but was regarded and acted on by them as giving the vendor an election, on default being made in the payment of the first installments of purchase-money as stipulated, to treat it as a lease from year to year, and the payments as made on account of rent; the defendant may, under a cross-bill, have the deeds cancelled, the possession of his lands restored to him, and recover damages by way of mesne profits from the time the tenancy was repudiated, thereby placing the parties in *statu quo*; and the original bill further praying an abatement of the purchase-money, on the ground that ten acres of the land in fact belonged to him at the time the contract was made, and was included in the deed and mortgage by mutual mistake, and this allegation being sustained by the proof, the original bill may be re-

CHANCERY—*Continued.*

- tained for this purpose, in order that complete justice may be done between the parties. *Ib.* 140.
61. *Waiver of answer on oath.*—When an answer on oath is waived by the complainant (Code, § 3762), the answer is mere pleading, even if responsive, and is not evidence for any purpose. *Zelnicker v. Brigham & Co.*, 598.
 62. *Amendment of answer, and of claim of exemption.*—When the original answer sets up an insufficient claim of exemption, its defects may be remedied by amendment; and an amended claim of exemption, allowed by the chancellor, will be treated by this court, if necessary, as an amendment of the answer. *Ib.* 598.
 63. *Answer construed, as to admission of mistake and offer to correct.* These averments, in an answer to a bill for the reformation of an alleged mistake in a written lease: "Defendant has never refused to reform said lease, and to make the necessary correction in it, and alleges that no application was ever made to respondent by complainant to do so, and that he would, at any time, if applied to, have corrected any mistake in said lease, and is still ready and willing to do so, if applied to by complainant,"—fall very far short of admitting the alleged mistake, and offering to correct it. *Robbins v. Battle House Co.*, 499.
 64. *Non-resident defendants; decree pro confesso against.*—A decree against a non-resident defendant, who does not appear, and who is brought in by publication only, can not be supported on error, unless the record affirmatively shows a compliance with the statutory provisions and rules of practice authorizing it; there must be a proper order of publication, made and executed as required by the statute and the rules of practice, and a decree *pro confesso* based thereon, which states the facts on which it is founded; and the mere recitals of the final decree, as to the rendition of a decree *pro confesso*, are not sufficient to show the rendition and regularity of such decree *pro confesso*. *Chilton v. Ala. Gold Life Ins. Co.*, 290.
 65. *Same; affidavit of non-residence.*—The affidavit as to the non-residence of the defendant must state whether, in the belief of the affiant, he is over or under the age of twenty-one years, or that his age is unknown (Rule No. 25; Code, p. 165); and the failure to comply with this rule is fatal to the regularity of the subsequent proceedings. *Ib.* 290.
 66. *Infants; how brought in as parties.*—A decree *pro confesso*, against an infant, is unauthorized and void; and the cause is not at issue as to him, until after a guardian *ad litem* has been appointed, and has answered. *Daily's Adm'r v. Reid*, 415.
 67. *Same; depositions taken before answer.*—Depositions in a chancery cause, taken before the cause is at issue as against an infant who is a material defendant, will be disallowed as evidence against him, and no motion to suppress them is necessary. *Ib.* 415.
 68. *Irregularities in putting cause at issue.*—When all the parties really affected by the decree have had their day in court, all being adults and *sui juris*, and have acquiesced in the decree until after an appeal is barred, irregularities in putting the cause at issue as to some of the defendants do not render the decree void, nor authorize the court to change or set it aside at a subsequent term. *Cochran v. Miller*, 51.
 69. *Motion to dissolve injunction; defects in affidavit to bill.*—An injunction will not be dissolved, on motion, on account of defects in the affidavit to the bill, unless the complainant fails, when required, to verify the bill by a sufficient affidavit. *Jacoby v. Goetter, Weil & Co.*, 427.
 70. *Same; by defendant in contempt.*—When a defendant is in contempt, for the violation of an injunction, he can not be heard on a motion

CHANCERY—*Continued.*

- to dissolve the injunction, until he has purged the contempt. *Ib.* 427.
71. *Variance between allegations and proof.*—Where the bill is filed by subsequent purchasers, against the mortgagee and alleged sub-purchasers claiming under him, asking an account and redemption; while the proof shows that a part of the property, though conveyed by the mortgage, was never sold under it, and that the defendant claiming that part holds under a purchase at a sale by the register foreclosing a former lien,—the variance is fatal, unless cured by amendment. *Conner v. Smith*, 115.
 72. *Same*; under bill to enforce vendor's lien, where vendor has been remitted to his original rights under several transfers of note. *Young v. Hawkins*, 370.
 73. *Issues at law; when ordered.*—Under the statutory provisions relating to issues out of chancery, and declaring that the court "must direct an issue to be made up whenever it is necessary for any fact to be tried by a jury" (Code, § 3890), although there may be cases in which, the evidence being plain and clear, it might be a reversible error for the chancellor to order the issue to be submitted to a jury, the question must necessarily be submitted to his discretion, when the evidence is indeterminate, or conflicting; and where the record shows that "the plaintiff's right of recovery depended largely on inferences to be drawn from suspicious circumstances, against positive testimony to the contrary," this court can not say that he erred in submitting the question of fact to a jury. *Adams v. Munter & Brother*, 338.
 74. *Same; objections to verdict, and decree non obstante.*—When the finding of the jury is based on illegal or insufficient evidence, or on improper rulings by the presiding judge, the chancellor may disregard it: and he may award a *venire de novo*, with more specific instructions, if he chooses to give them; but, when no certified exceptions are brought before him, and the record does not show what evidence was adduced on the trial before the jury, this court can not declare that the complainant was entitled to a decree *non obstante veredicto*, because the finding of the jury is not sustained by the depositions on file in the cause. *Ib.* 338.
 75. *Exceptions to register's report.*—Exceptions to the register's report, on the statement of an account, if not accompanied by a note of the evidence relied on to support them (Rule No. 93; Code, p. 174), may be overruled. *Pruitt v. McWhorter*, 315.
 76. *Taking additional testimony after remandment of cause.*—The chancellor's first decree in this cause having been reversed by this court on appeal, and the cause remanded, the grantee was properly allowed to take additional testimony, with the view of proving the actual consideration paid by him, for which, under the decision of this court, the deed was allowed to stand as a valid security; the same rule applying in such cases as in an application for a re-reference of matters of accounts, or for the re-examination of witnesses after the publication of testimony. *Gordon, Rankin & Co. v. Tweedy*, 232.
 77. *Dismissal on demurrer, in vacation.*—When a bill is dismissed on demurrer in vacation, on account of defects which are amendable, the complainant should be allowed an opportunity to amend it; and the failure to allow him an opportunity to amend will work a reversal of the decree on error. *Conner & Wife v. Smith*, 115.
 78. *Same.*—A decree rendered in vacation, dismissing a bill on demurrer, or, perhaps, on motion to dismiss for want of equity, without affording the complainant an opportunity to amend, is erroneous; but this rule does not apply to a dismissal on final hearing on

CHANCERY—*Continued.*

- pleadings and proof, where the substantial defects of the proof can not be remedied by amendment. *Goodlett v. Kelly*, 213.
79. *Sale by register.*—In making a sale under a decree, the register is bound to conform to its terms; he can not sell on credit, when ordered to sell for cash; but, while he can not bind himself to wait on the purchaser any specified time, a mere delay of two days in collecting the money bid is not sufficient to avoid the sale, when no injury resulted from the delay. *Chilton v. Ala. Gold Life Ins. Co.*, 290.
 80. *Burden and sufficiency of proof.*—The *onus* of proof resting on the complainant to establish his case, if the evidence adduced is doubtful, or in equipoise, he is not entitled to a decree. *Evans, Fite, Porter & Co. v. Winston*, 349.
 81. *Revision of chancellor's decision on facts.*—The burden of proof being on a party who asserts an estoppel *en pais*, and the evidence being conflicting, if the chancellor holds the evidence insufficient to establish it, this court will not reverse his ruling, "unless clearly convinced that he erred." *Wilkinson v. Searcy*, 243.
 82. *Presumption in favor of decree.*—Where a decree is rendered on pleadings and proof, and the testimony is not set out in the record, this court will presume that the decree was sustained by the proof. *Toon v. Finney*, 343.
 83. *When decree is final.*—A decree in chancery is final, when it ascertains all the rights of the parties litigant, although there may be a reference to the register, to ascertain facts necessary for an account, and to state the account between the parties. *Cochran v. Miller*, 50.
 84. *Same.*—A decree rendered under a submission on pleadings and proof, granting relief to the complainant as prayed, is final, and necessarily involves and implies the overruling of demurrers to the bill, although they are not overruled in terms. *Ib.* 50.
 85. *Decree partly final, and partly interlocutory.*—A decree may be partly final, and partly interlocutory; as, where it settles all the equities between the parties, and the principles on which relief is granted, but orders an account to be taken, or other proceedings to be had to carry it into effect; in which case, the chancellor can not, at a subsequent term, alter the principles on which relief was granted (as to which the decree is final), but may modify or change the interlocutory directions for carrying it into effect; and this court, on appeal, sued out after the completion of the statutory bar, is limited to an inquiry into the regularity of the subsequent proceedings, when they have progressed into a final decree which will support an appeal. *Ib.* 50.
 86. *Costs.*—In equity, as a general rule, costs may be decreed against either party, or may be apportioned, at the discretion of the chancellor; and an error in this regard, if there be nothing more in the case, is not a ground of reversal. *Allen v. Lewis*, 379.
 87. *Same.*—To call this discretionary power into exercise, the cause must have been submitted, either in whole or in part, to the chancellor for decision; and this is not done where the complainant dismisses his own suit, thereby assuming the costs he has caused. But, where the defendant, after answer filed, buys his peace, or purchases the complainant's asserted cause of action; the complainant binding himself to dismiss his suit, but failing to do so, whereby the defendant is forced to set up the release by supplemental or amended answer; and the cause is then submitted on his motion to dismiss the bill, in accordance with the stipulation in the release; the judicial functions of the court are called into exercise, and the decree as to costs is not revisable. *Ib.* 379.
 88. *Same; when payable out of fund in court.*—The taxation of costs is

CHANCERY—Continued.

a matter of discretion, and they may properly be taxed and made payable, in a foreclosure suit, out of any moneys in the custody of the court, belonging to any of the parties litigant, and subject to the lien of the mortgage. *Falkner v. Campbell Printing Press Co.*, 359.

89. *Costs against relators.*—When a bill in equity is filed by the attorney-general in the name of the State, on the relation of certain private citizens and tax-payers, and for their benefit, costs may be adjudged against the relators, on a dismissal of the bill. *The State v. City Council of Montgomery*, 226.

CHARGE OF COURT TO JURY.

1. *Requisites of.*—Charges asked should be "clear and explicit, easy of interpretation, and not liable to mislead;" and if wanting in these requisites, they are properly refused. *Peterson v. The State*, 34.
2. *Charge invading province of jury.*—The court can not assume an admission as proved, although there was evidence tending to establish it, when it was in fact controverted. *Humes v. O'Bryan & Washington*, 65.
3. *Charge requiring explanation.*—A charge asked which, without explanation, tends to confuse or mislead the jury, is properly refused. *Wells v. The State*, 21.
4. *Request for explanatory charge.*—When evidence is admitted which is competent for one purpose, if the party against whom it is admitted fears injury from its consideration for any other purpose, he should ask a charge limiting its operation. *Ib.* 21.
5. *Same.*—When charges given announce correct principles of law, though "some of them are abstract and misleading, because not strictly relevant to the peculiar phases of the evidence, their misleading tendencies should have been corrected by counter charges requested by the defendant," and they present no reversible error. *Williams v. The State*, 18.
6. *Same.*—In an action against a railroad company, to recover damages for personal injuries, a charge which states the correct rule as to negligence, but ignores the evidence tending to show contributory negligence, is not therefore erroneous; the question of contributory negligence being defensive in its character, and properly calling for an explanatory charge. *Railroad Co. v. Clark*, 443.
7. *On question of negligence vel non.*—The question of negligence *vel non* is a question of law for the decision of the court, "only when the case is so free from doubt that the inference of negligence to be drawn from the facts is clear and certain;" in all other cases, it is a question of fact for the determination of the jury. *Railroad Co. v. Bayliss*, 150.
8. *Same.*—Whether it is negligence for an engineer to run his train at a stated number of miles per hour, is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, &c.; and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident. *Ib.* 150.
9. *Charge asked, not shown to have been in writing.*—The refusal of a charge asked, which is not shown to have been asked in writing, is not a reversible error. *Allen v. The State*, 557.
10. *Charges given, but not shown to have been so induct.*—It is not necessary that the record shall affirmatively show that charges given

CHARGE OF COURT TO JURY—*Continued.*

on request, or refused, were indorsed as required by the statute (Code, § 3109); in the absence of a recital to the contrary, and exception duly reserved on account of it, this court will presume that the charges were properly so indorsed. *Ib.* 557.

CLERKS.

1. *Official oath of deputy-clerk.*—Under the general statute (Code, § 676), deputy-clerks are required to take an official oath; and the special statute "regulating the holding of the Circuit Courts of Barbour county" (Sess. Acts 1878-9, pp. 106-09), authorizing the appointment of a deputy by the circuit clerk, does not dispense with the necessity of a compliance with this provision by such deputy. *Joseph v. Cawthorn*, 411.
2. *Attachment issued by deputy-clerk, who has not taken official oath.* An attachment issued by a deputy-clerk who is performing the duties of the office under appointment by his principal, is not voidable, nor subject to be abated on plea, because he has never taken the official oath prescribed by law; his official acts, like those of any other officer *de facto*, having the same force and effect, so far as the public and third persons are concerned, as the acts of an officer *de jure*. *Ib.* 411.

CODE OF ALABAMA.

1. Construction of section not dependent on location. *Zelnicker v. Brigham & Co.*, 598.
2. Legislative adoption of judicial construction. *E. T., Va. & Ga. Railroad Co. v. Bayliss*, 150.
3. § 676. Official oath of deputy-clerk. *Joseph v. Cawthorn*, 411.
4. §§ 1699, 1700. Liability of railroad companies for injuries to persons or stock. *E. T., Va. & Ga. Railroad Co. v. Bayliss*, 150.
5. § 1711. Limitation of action for such injuries. *Ib.* 150.
6. § 1714. Service of process on agent. *Ib.* 150.
7. § 2121. Statute of frauds. *Foster v. Napier*, 393.
8. § 2126. General assignments. *Heyer Brothers v. Bromberg Brothers*, 524.
9. § 2131. Gaming contracts. *Lewis v. Bruton*, 317.
10. § 2146. Acknowledgment of conveyance. *Sikes v. Shows*, 332.
11. §§ 2166-67. Protection to creditors and purchasers against unrecorded conveyances. *Bailey, Davis & Co. v. Timberlake*, 221.
12. § 2193. Implied covenants of warranty in deed. *Wilkinson v. Searcy*, 243.
13. § 2218. Testamentary power to sell lands. *Robinson v. Allison*, 254.
14. § 2238. Widow's statutory quarantine. *Barber v. Williams*, 331.
15. §§ 2439-40. Crop completed and gathered by administrator. *Loeb & Weil v. Richardson*, 311.
16. § 2449. Sale of lands for division. *Pollard v. Hanrick*, 334.
17. § 2602. Keeping decedent's estate together. *Hinson v. Williamson*, 180.
18. § 2706. Rents and profits of wife's statutory estate. *Vincent v. The State*, 274.
19. §§ 2715-16. Wife's dower, when having statutory estate. *Gordon, Rankin & Co. v. Tweedy*, 232.
20. § 2731. Removal of disabilities of coverture. *Doe, ex dem. Stoutz v. Burke*, 530.
21. § 2825. Exemption of personal property to widow. *Loeb & Weil v. Richardson*, 311.

CODE OF ALABAMA—Continued.

22. § 2828. Declaration and claim of exemption. *Wright v. Grabsfelder & Co.*, 460.
23. § 2834. Claim of exemption to property levied on. *Ib.* 460.
24. § 2835. Contest of claim of exemption. *Sims v. Eslava*, 594.
25. §§ 2838, 2841. Contest of claim of exemption. *Loeb & Weil v. Richardson*, 311; *Coffey v. Joseph*, 271.
26. § 2843. Lease and abandonment of homestead. *Seafife v. Argall*, 473.
27. §§ 2877-80. Redemption of real estate. *Bailey, Davis & Co. v. Timberlake*, 221; *Parmer v. Parmer*, 285.
28. § 2890. Who is proper party plaintiff. *Wolfe v. Eberlein*, 99.
29. § 2935. Service of process on corporation. *E. T., Va. & Ga. Railroad Co. v. Bayliss*, 150.
30. § 2942. Detinue bond. *Foster v. Napier*, 393.
31. §§ 2951-4. Suggestion of adverse possession and erection of permanent improvements. *Pickett v. Pope*, 122.
32. §§ 2962-3. Disclaimer and plea of not guilty. *McQueen v. Lampley*, 408.
33. § 2996. Statute of limitations to set-off. *Washington v. Timberlake*, 259.
34. § 3039. Receipts and releases. *Cowan & Co. v. Sapp*, 44.
35. § 3058. Competency of parties as witnesses, in actions by or against administrators. *Goodlett v. Kelly*, 213.
36. § 3109. Indorsement of charges. *Allen v. The State*, 557.
37. § 3112. Nonsuit, with bill of exceptions. *Perry v. Danner & Co.*, 485.
38. § 3156. Amendments. *Mobile Life Ins. Co. v. Randall*, 170; *Bolman v. Lobman*, 507.
39. § 3213. Levy and sale under execution after defendant's death. *Sims v. Eslava*, 594.
40. § 3222. Answer of corporation as garnishee. *M. & C. Railroad Co. v. Whorley*, 264.
41. § 3242. Fraud as exception to statute of limitations. *McCarthy v. McCarthy*, 446.
42. § 3286. Advances to make crop. *Connor v. Jackson*, 464.
43. §§ 3440-47. Mechanic's lien. *Young & Co. v. Stultz & Co.*, 574.
44. §§ 3467-72. Landlord's lien on crop. *Coleman v. Siler*, 435; *Jackson v. Bain*, 328.
45. §§ 3497-3513. Partition of lands. *Wilkinson v. Stuart*, 198.
46. §§ 3514-20. Sale of lands for division. *Ib.* 198.
47. § 3696. Forceful entry and unlawful detainer. *Weldon v. Schlosser*, 355.
48. §§ 3711-13. Writ of restitution, and bond. *Robbins v. Battle House Company*, 499.
49. § 3762. Waiver of answer on oath. *Zelnicker v. Brigham & Co.*, 598.
50. § 3886. Bill in equity to set aside fraudulent conveyance. *Ib.* 598.
51. § 3890. Issue at law. *Adams v. Munter & Brother*, 338.
52. § 3928. Special appeal bond. *Cahall v. Citizen's Mutual Building Asso.*, 539.
53. § 3945. Release of errors by confession of judgment. *Burke v. The State*, 399.
54. § 3954. Limitation of appeal. *Lanier v. Russell*, 364.
55. § 4118. Bribery of juror. *Caruthers v. The State*, 406.
56. § 4212. Gaming on steamboat. *Johnson v. The State*, 537.
57. § 4295. Murder. *Kilgore v. The State*, 1.
58. § 4340. Forgery. *Allen v. The State*, 557.
59. § 4419. Trespass after warning. *Owens v. The State*, 401.
60. §§ 4454-5. Confession of judgment for fine and costs. *Burke v. The State*, 399.

CODE OF ALABAMA—Continued.

61. § 4734. Competency of coroner as juror. *Jackson v. The State*, 26.
62. § 4754. Organization of grand jury. *Kilgore v. The State*, 1.
63. § 4765. Oath of petit jury. *Peterson v. The State*, 34; *Johnson v. The State*, 537.
64. § 4813. Indictment for perjury. *Ib.* 34.
65. § 4821. Filing and indorsing indictment. *Jackson v. The State*, 26.
66. § 4883. Competency of juror opposed to capital punishment on circumstantial evidence. *Ib.* 26.
67. § 4895. Corroborating testimony of accomplice. *Ross v. The State*, 532.
68. § 4900. Abusive words as evidence on trial for assault and battery. *Brown v. The State*, 42.
69. § 4904. Conviction of attempt to commit offense charged. *Burke v. The State*, 399.

COMMON CARRIERS.

1. *Liability of railroad company as common carrier, and as warehouseman.*—When a railroad company receives goods for transportation, safely transports them to the point of destination, informs the consignee of their arrival, and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier are at end; and if the goods are then left in its custody, its liability for a subsequent loss or damage is that of a warehouseman only. *Kennedy Brothers v. M. & G. Railroad Co.*, 430.
2. *Variance.*—In an action against a railroad company as a common carrier, for the loss of goods, the complaint being in the form prescribed by the Code (Form No. 13, p. 703), a recovery can not be had on proof of a loss which occurred after the defendant's duty and liability as a carrier had terminated, and while the goods had been left in its custody as a warehouseman. *Ib.* 430.
3. *Negligence;* charges as to, in actions against railroad company as common carrier. *Railroad Co. v. Clark*, 443; *Railroad Co. v. Bayliss*, 150.

CONFLICT OF LAWS.

1. *Homestead exemption; governed by what law.*—As against the claims of creditors, the right to a homestead exemption must be determined by the law which was of force when the debt was created, or the liability incurred. *Cochran v. Miller*, 50.

CONFUSION OF GOODS. See ATTACHMENT, 5.

CONSTITUTIONAL LAW.

1. *Retroactive laws changing rules of evidence.*—Laws affecting the admissibility or competency of evidence, in civil cases, pertain only to the remedy; and there is no constitutional provision, State or Federal, which takes away or limits the discretionary power of the General Assembly, in enacting or changing such laws, to make them applicable to pending actions or existing causes of action. *Goodlett v. Kelly*, 213.
2. *Actions against corporations.*—The constitutional provision which declares that corporations "shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons" (Art. xiv. § 12), forbids the imposition of arbitrary, unjust and odious discriminations against them, under the form or guise of laws regulating judicial procedure; but it has no reference to the venue in civil actions, which belongs only to the remedy or form of procedure; and it does not inhibit the passage of a general law

CONSTITUTIONAL LAW—*Continued.*

authorizing a corporation to be sued in any county in which it transacts business through its agents, though an individual citizen can only be sued in the county of his residence. On the contrary, such a law is based on sound reasons, growing out of the difference between natural and artificial persons, does not violate the essential principles of justice, and does not establish an unjust or unreasonable discrimination against corporations. *Home Protection v. Richards & Sons*, 466; also, *Mobile Life Insurance Co. v. Pruett*, 487.

3. *Charter of corporation; inviolability as contract.*—The charter of a private corporation, when accepted, is an executed contract between the State and the corporators, and within the protection of the constitutional provision, State and Federal, against laws impairing the obligation of contracts; and it can not be amended or modified without the consent of the corporation, by subsequent legislation, unless the power of amendment is expressly reserved in the charter, or by some existing general law, or constitutional provision. *Mobile & Spring Hill Railroad Co. v. Kennerly*, 566.
4. *Constitutional inhibition against exemption from taxation.*—The constitution of 1819, which was in force in 1860, contained no limitation or restriction upon the power of the General Assembly, in the imposition of taxes, to make discriminations or exemptions in favor of either individuals or corporations. *Ib.* 566.

CONTINUANCE.

1. *Conditional on terms as to taking depositions.*—In the exercise of its discretionary power to grant continuances "upon such terms as to the court shall seem proper" (Rule No. 16, Code, p. 160), the court may, in granting a continuance to the defendant, order that the plaintiff, "in consideration of said continuance," be allowed to take the depositions of certain named witnesses, "on filing interrogatories and giving notice as in such cases required by law," dispensing with a preliminary affidavit. *Humes v. O'Bryan & Washington*, 64.
2. *Same; exception to such order.*—Although the minute-entry granting such continuance further recites that the defendant *excepted* to the order, the exception avails nothing, when the record shows that the defendant had the full benefit of the continuance: he must accept or reject the continuance, with the terms annexed, as an entirety. *Ib.* 64.

CONTRACTS.

1. *Agreement among creditors, as to postponement and extension of debts.* A proposal by one of the creditors of an embarrassed debtor, to forbear the assertion and collection of his claim until the claims of the other creditors have been satisfied, on the condition and consideration that they would all consent to an extension as asked by the debtor, does not become binding as a contract until accepted by all the other creditors. *Heyer Brothers v. Bronberg Brothers*, 524.
2. *Same; partial acceptance, and waiver.*—If such proposal is accepted by only a portion of the creditors, and acceptance by the others is waived by the creditor making it, the accepting creditors, seeking redress for a subsequent breach of the agreement on his part, must allege such partial acceptance and waiver. *Ib.* 524.
3. *Same; remedy for breach.*—As to the proper remedy for the breach of such an agreement, after acceptance, *quære*. "Probably, an action at law, founded on the agreement as inducement, would be the remedy; or, to avoid multiplicity of suits, possibly a bill in equity would lie." *Ib.* 524.

CONTRACTS—*Continued.*

4. *Agreement construed, as to conflicting claims of landlord and merchant making advances.*—Under a written agreement between a landlord, claiming a statutory lien on his tenants' crops for rents and advances, and a merchant claiming a statutory lien for advances, by which it is stipulated that P., the merchant, "is to get to-day three bales of cotton (two from Henry, and one from Nathan), less the rents, and out of the next lot of said Henry and Nathan S. [landlord] is to get two-thirds, provided it does not exceed their indebtedness to him for the year 1881, and so on until both claims are settled;" the lien for rent is expressly reserved and retained on the three bales delivered to the merchant, and the landlord's lien for advances is, by necessary implication, abandoned as to those bales; while, as to the residue of the bales raised by the tenants named, two-thirds thereof is made subject to his claim for rent and advances, but only during the year 1881. *Coleman v. Siler, 435.*
5. *Waiver of landlord's lien for advances.*—When a landlord agrees and promises, by letter addressed to a merchant, not to make any advances to his tenants if the merchant will furnish them with supplies, this necessarily postpones and subordinates his lien for any advances afterwards made to them, to the merchant's lien for advances made on the faith of the letter; and in a controversy between him and a purchaser from the merchant, he can not claim to appropriate any part of the proceeds of sale of the tenant's crop to his lien for such advances, until the merchant's lien is fully paid and satisfied. *Ib. 435.*
6. *Contract between landlord and merchant furnishing supplies to tenants; respective rights and liens under.*—If a merchant agrees and promises, at the instance of the landlord, to make statutory advances to his tenants to a specified amount; and the landlord, in consideration thereof, agrees to be responsible for the debt, and transfers his rent contracts as collateral security for its payment; the merchant can not enforce this obligation, when it is shown that he failed to furnish supplies to the full amount specified; but, if he complied fully with his undertaking, he would be entitled to payment out of the crops, in preference to the landlord's claim for rents. *Foster v. Napier, 393.*
7. *Parol evidence as to consideration of writing.*—A landlord having procured a merchant to make statutory advances to one of his tenants, from whom a crop-lien note was taken by the merchant, and having executed to the merchant a writing in these words, "I hereby agree and obligate [myself] to bear half the loss, provided the crop does not pay said F. [merchant] five hundred dollars, for furnishing J. and his hands during the year 1879;" parol evidence is admissible, to show that the consideration of the writing was the agreement and promise of F. to furnish supplies to said J. to the amount of five hundred dollars. *Ib. 393.*
8. *Merger of parol stipulations in writing.*—When a contract is reduced to writing, executed by one party and accepted by the other, the writing becomes, in the absence of fraud or mistake, the sole memorial and expositor of the terms of the contract, and all prior verbal stipulations are merged in it. *Pettus v. McKinney, 108;* also, *Mobile Life Ins. Co. v. Pruett, 487.*
9. *Alteration of contract.*—Though the terms of a written contract can not be contradicted or varied by proof of inconsistent verbal agreements made contemporaneously or previously, it may be modified or rescinded by a subsequent verbal agreement; and the mutual assent of the parties is a sufficient consideration to sustain such modification or rescission. *Mobile Life Ins. Co. v. Pruett, 487;* also, *Coleman v. Siler, 435.*

CONTRACTS—Continued.

10. *Promise for benefit of third person.*—A promise to one person, to pay a debt due from him to another, enures to the benefit of the latter, and may be enforced by him. *Young v. Hawkins*, 370.
11. *Tripartite agreement between landlord, his creditor, and tenant.*—A tripartite agreement between the landlord, his creditor, and the tenant or lessee, by which the latter assumes the landlord's pre-existing debt to the amount of the stipulated rent for the year, executing to the creditor his negotiable promissory notes secured by mortgage, which the creditor accepts in satisfaction, *pro tanto*, of the landlord's indebtedness to him, entering a credit as for a partial payment, operates on the principle of novation and substitution, and effects an extinguishment of the original debts between the parties. *Comer v. Sheehan*, 452.
12. *Novation of contract between vendor and purchaser.*—Where lands were sold by an executor, under authority conferred by a private statute, for the purpose of division and distribution among the parties interested under the will, five of whom became the purchasers, and gave their joint note for the deferred payment; and the sale was reported to the Chancery Court, as required by the statute, and was confirmed; and afterwards, in order to enable the executor to settle with the other devisees and distributees, the purchasers gave him receipts for their distributive shares of the estate, at an agreed valuation, in part payment of the note, and a new joint note for \$2,500, balance of purchase-money in excess of agreed valuation; and he thereupon reported the purchase-money paid in full, executed a conveyance to the purchasers under the order of the court, and charged himself with the purchase-money on final settlement of his accounts; and four of the purchasers paid their proportion of the \$2,500, but the fifth failed to pay any part of her proportion, the arrangement made by her husband for its payment having failed by reason of his misrepresentations to the executor; *held*, that the compromise, or settlement of the original note, was a novation of the contract, and discharged the land which, on subsequent division by agreement among the purchasers, was allotted to the defaulting distributee, from a vendor's lien for the unpaid balance. *Williams v. McCarty*, 295.
13. *Telegrams; construction of, and relevancy as evidence.*—When the contract sued on was negotiated and consummated between the parties by telegraph, the several dispatches, as written instruments, must be construed by the court; but, when they passed between other persons, and are not the foundation of the action, they may be relevant evidence of a collateral fact, and may be submitted to the jury for that purpose; as to establish the fact of partnership, where they related to the existence and solvency of the alleged partnership, and the answer to inquiries was sent with the consent of the defendant sought to be charged. *Humes v. O'Bryan & Washington*, 64.
14. *Same.*—A telegram sent to a merchant, in reply to an inquiry as to the solvency of a commercial partnership, saying "Sell small bill, and on short time," may authorize another person to act on the information, and to sell goods on the faith of the partnership, if it was sent with the knowledge of the defendant sought to be charged as a partner. *Ib.* 64.
15. *Whether contract is sale or lease, purchase or tenancy.*—A contract may be so framed as to operate either as a sale or as a lease—either a purchase or a tenancy; as in *Collins v. Whigham* (58 Ala. 438), where the contract was construed as giving the option to the purchaser, in the first instance, to treat it as a purchase or as a lease, and, on his failure to express his election by the day named, it was held that the vendor might elect. *Wilkinson v. Roper*, 140.

CONTRACTS—*Continued.*

16. *Same.*—Where lands are conveyed by absolute deed, with covenants of warranty, the purchaser giving his written obligation to deliver twelve bales of cotton to the vendor, in annual installments of four bales each, and a mortgage on the land to secure their payment; a stipulation in the mortgage in these words, "And in case of failure to make the first two payments on said land, then we agree and hereby promise to pay said W. [vendor] two bales of cotton each year for the rent of said lands," does not, of itself, show that the contract was a conditional sale, dependent on the payment of the first two obligations at maturity, and, on default of such payment, operating only as a lease from year to year. But the acts and conduct of the parties under the contract, as proved by receipts given and accepted, and other writings, show that they so understood and regarded it, or subsequently modified it, and that the cotton delivered was paid, not as purchase-money, but as rent. *Ib.* 140.
17. As to the specific execution of contracts, see CHANCERY, 33-5.

See, also, INSURANCE; VENDOR AND PURCHASER.

CORPORATION.

1. *Constitutional provisions as to actions against corporations; where corporation may be sued.*—The constitutional provision which declares that corporations "shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons" (Art. XIV, § 12), forbids the imposition of arbitrary, unjust and odious discriminations against them, under the form or guise of laws regulating judicial procedure; but it has no reference to the venue in civil actions, which belongs only to the remedy or form of procedure; and it does not inhibit the passage of a general law authorizing a corporation to be sued in any county in which it transacts business through its agents, though an individual citizen can only be sued in the county of his residence. On the contrary, such a law is based on sound reasons, growing out of the difference between natural and artificial persons, does not violate the essential principles of justice, and does not establish an unjust or unreasonable discrimination against corporations. *Home Protection v. Richards & Son*, 466; also, *Mobile Life Ins. Co. v. Pruett*, 487.
2. *Action for malicious prosecution.*—An action on the case for a malicious prosecution may be maintained against a corporation. (The case of *Owsley v. M. & W. P. Railroad Co.*, 37 Ala. 360, on this point, is against the weight of more recent decisions, and is overruled.) *Jordan v. Ala. Gr. So. Railroad Co.*, 85.
3. *Service of process on agent, for corporation.*—In an action against a railroad company, for injuries to stock, the summons and complaint may be served on a "depot-agent" (Code, § 1714), without the affidavit required (*Ib.* § 2935), in other actions against corporations, when the service is on any other person than the "president, or other head thereof, secretary, cashier, or managing agent." *E. T., Va. & Ga. Railroad Co. v. Bayliss*, 150.
4. *Judgment against corporation; service of process on agent, or answer as garnishee by agent.*—A judgment by default against a corporation must show that proof was made of the agency of the person upon whom the process was served; and by statutory provision (Code, § 3222), an answer for a corporation as garnishee can not be made by any person, "unless he shall make affidavit that he is the duly authorized agent of such corporation to make such answer." *M. & C. Railroad Co. v. Whorley*, 264.
5. *Same; waiver of defective service or answer by appearance.*—Although the answer of the agent is not accompanied with the prescribed

CORPORATION—*Continued.*

affidavit, the defect is waived by the subsequent appearance of the corporation, recognizing his authority to answer for it; and the recitals of the record in this case, as to the appearance of the parties by attorney, and continuances by consent, affirmatively show such appearance by the corporation. *Ib.* 264.

6. *Charter of corporation; inviolability as contract.*—The charter of a private corporation, when accepted, is an executed contract between the State and the corporators, and within the protection of the constitutional provision, State and Federal, against laws impairing the obligation of contracts; and it can not be amended or modified without the consent of the corporation, by subsequent legislation, unless the power of amendment is expressly reserved in the charter, or by some existing general law, or constitutional provision. *Mobile & Spring Hill Railroad Co. v. Kennerly*, 566.
7. *Exemption from taxation, under charter of corporation.*—When an exemption from taxation, total or partial, is claimed by a private corporation under its charter, or act of incorporation, the courts require that the legislative intent to confer such exemption shall be expressed in clear and unambiguous terms; and if there is a just and reasonable doubt as to such intent, it is resolved against the corporation. *Ib.* 566.
8. *Act incorporating Mobile and Spring Hill Railroad Company; limitation upon municipal taxation.*—Under the act incorporating the Mobile and Spring Hill Railroad Company, approved February 23d, 1880 (Sess. Acts 1859-60, p. 265), while it is declared that, in consideration of the privileges thereby granted, "the property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals, and shall be taxed in no other way," the corporate authorities of the city of Mobile are authorized and empowered "to impose an annual taxation of one dollar on every one hundred dollars of the gross earnings of said company, which said tax," it is declared, "shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages." *Held*, that these provisions indicate a clear legislative intent to exempt the corporation, to the extent specified, from all other municipal taxation than that expressly authorized. *Ib.* 566.
9. *Same; how affected by change of municipality from city to port of Mobile.*—Whatever may be the legal relation existing between the "port of Mobile" and the former "city of Mobile," and the incidents attaching to that relation, the new corporation, like the old, has no power to impose on said railroad corporation any other tax or rate of taxation than that specified in said special charter. *Ib.* 566.
10. *Powers of corporations.*—A corporation takes nothing by its charter, except what is plainly, expressly, and unequivocally granted, or necessarily implied; and in all things else the powers which the State may exercise over its affairs are as full and ample as over individuals carrying on the same business. *Street Railway Co. v. Kennerly*, 583.
11. *Commutation tax on railroads in Mobile; not applicable to corporation constructing road under special charter.*—By an act approved February 4th, 1860, the corporate authorities of the city of Mobile were authorized to grant to any person, association or company, the right and privilege of constructing a railroad along and through any streets in the city, for a period not longer than twenty years, and to prescribe the kind of rail to be used, the width and length of the track, the location of turnouts, &c.; and they were authorized to impose and collect, "from each company, person or association erecting any railway under the authority of this act," a tax

CORPORATION—*Continued.*

of one dollar on every hundred dollars of the gross earnings of such railway company, which tax, it was declared, "shall be in lieu and in full of all taxes and impositions of any nature in favor of said city of Mobile, upon such railway, equipments, stock and appendages." The appellant corporation, chartered in 1858, under the name of the "Mobile Omnibus Company," was authorized by an act amending its charter, approved February 24th, 1860, "upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway or railways on any street or streets in said city; *provided*, however, that all restrictions, limitations and conditions prescribed in the act" above named, approved February 4th, 1860, "shall apply to said company, should it obtain the privilege from said city authorities to construct and use such railroad." *Held*, that the provision in reference to the special tax authorized by said act of February 4th, 1860, was not one of the "restrictions, limitations and conditions" referred to, in the proviso; and that said corporation, having obtained the consent of the city authorities, and constructed its railroad through the streets of the city, could not claim the benefit of said provision, and was subject to other taxation. *Id.* 583.

12. *Municipal bonds in aid of railroad; injunction of tax to pay interest on.*—The corporate authorities of the city of Montgomery having been authorized, by special statute, to submit to a vote of the citizens the question of granting aid to the South and North Alabama Railroad Company, on the terms agreed on between the said corporate authorities and the directors of the railroad company, and to issue city bonds in aid of the railroad, if the election resulted in favor of subscription; the issue and negotiation of the city bonds might be enjoined, at the suit of individual citizens and tax-payers, on the grounds that a majority of those voting at the election did not in fact vote in favor of subscription, and that the propositions voted on were afterwards changed, to the detriment of the city, by agreement between the city authorities and the railroad directors, "if these facts had been shown at the proper time;" but, the bonds having been issued, being regular on their face, negotiable in form, and having passed into the hands of third persons, as purchasers for value, who are not charged with knowledge or notice of any irregularity in their issue, as against them such irregularities avail nothing, and the tax-payers can not enjoin the collection of a municipal tax levied to pay the interest on them. *The State v. City Council of Montgomery*, 226.
13. *Special statute authorizing city of Montgomery, on vote of citizens, to aid in construction of South and North Alabama railroad; certificate of managers, as to result of election; difference between propositions voted on and those afterwards accepted; levy of tax on real estate only.*—As to the construction of the act approved December 7th, 1866, entitled "An act to authorize the city of Montgomery to aid in building and equipping the South and North Alabama railroad from Montgomery to Limekiln" (Sess. Acts 1866-7, pp. 141-46); the election held under said act; the conclusiveness of the certificate of the managers, as to the result of that election; the alleged difference between the propositions voted on and those afterwards accepted by the city authorities, and the validity of a tax levied on real estate only to pay the interest on the bonds issued,—these questions were decided adversely to the present appellants, in the case of *Winter v. City Council of Montgomery* (65 Ala. 403-17), which see. *Id.* 226.

COSTS.

1. *Of transcript.*—The court complains of the confused state of the transcript in this case, and orders that no costs shall be allowed for it. *Foster v. Napier*, 393.
2. *Of return to certiorari.*—A *certiorari* having been granted in this case, to perfect the record by showing the organization of the grand jury and other proceedings, it was ordered, that the clerk be allowed no costs for the return. *Bell v. The State*, 420; *Ross v. The State*, 532.
3. *In equity.*—In equity, as a general rule, costs may be decreed against either party, or may be apportioned, at the discretion of the chancellor; and an error in this regard, if there be nothing more in the case, is not a ground of reversal. *Allen v. Lewis*, 379.
4. *Same.*—To call this discretionary power into exercise, the cause must have been submitted, either in whole or in part, to the chancellor for decision; and this is not done where the complainant dismisses his own suit, thereby assuming the costs he has caused. But, where the defendant, after answer filed, buys his peace, or purchases the complainant's asserted cause of action; the complainant binding himself to dismiss his suit, but failing to do so, whereby the defendant is forced to set up the release by supplemental or amended answer; and the cause is then submitted on his motion to dismiss the bill, in accordance with the stipulation in the release; the judicial functions of the court are called into exercise, and the decree as to costs is not revisable. *Ib.* 379.
5. *Same.*—The taxation of costs is a matter of discretion, and they may properly be taxed and made payable, in a foreclosure suit, out of any moneys in the custody of the court, belonging to any of the parties litigant, and subject to the lien of the mortgage. *Falkner v. Campbell Printing Press Co.*, 359.
6. *Same.*—When a bill in equity is filed by the attorney-general in the name of the State, on the relation of certain private citizens and tax-payers, and for their benefit, costs may be adjudged against the relators, on a dismissal of the bill. *The State v. City Council of Montgomery*, 226.

CRIMINAL LAW.

ACCOMPLICES.

1. *Flight, and proximity to scene of crime, as evidence corroborating accomplice.*—The fact of flight, by a person accused or suspected of crime, has of itself some probative force as a criminating circumstance; and when it appears that the crime was committed at a very unseasonable hour in the middle of the night, proximity to the scene, and opportunity for committing it, are circumstances "tending to connect the accused with its commission" (Code, § 4895), as those words are used in the statute forbidding a conviction of felony on the uncorroborated testimony of an accomplice. *Ross v. The State*, 532.
2. *Corroborative evidence; when necessary.*—Corroborative evidence, as necessary to authorize a conviction on the testimony of a single witness, is only required when that witness is an accomplice (Code, § 4895); and when the jury is left in doubt as to whether the witness was in fact an accomplice, while such doubt may be considered by them in weighing his testimony, the case is not within the statute. *Ib.* 532.
3. *Declarations and conduct of conspirators, as evidence against each other.*—In charges of crime which, in their nature, may be perpetrated by more than one guilty participant, if there be a previously formed purpose to commit the offense, the acts, declarations and

CRIMINAL LAW—Continued.

conduct of each conspirator, in promotion of the object or purpose of such conspiracy, or in relation to it, become the acts, declarations and conduct of the others, and are competent evidence against them; but the sufficiency of such evidence must be determined by the jury, and, before it can be admitted to go to them, a foundation should be laid, by proof addressed to the court, *prima facie* sufficient to establish the existence of such conspiracy. *McAnally v. The State*, 9.

ADULTERY.

4. *Constituents of offense*.—To authorize a conviction for living in adultery, it is not necessary that both of the parties should be married. *White v. The State*, 31.
5. *Proof of defendant's sex*.—In determining the sex of the defendant, he being personally present in court, the jury may look at his dress and general appearance, in connection with all the evidence in the case; and the court may properly instruct them to that effect, when requested to charge that they "can only look to the sworn statements of the witnesses in determining whether the defendant is a man." *Ib.* 31.

ASSAULT AND BATTERY.

6. *Violent character of person assaulted; admissibility as evidence*.—In a prosecution for an assault and battery, where the defendant was himself the aggressor, he can not be permitted to adduce evidence of the bad character of the person assaulted, as a violent, dangerous, or turbulent man. *Brown v. The State*, 42.
7. *Abusive or insulting language; admissibility as evidence*.—The statute which allows a defendant who is prosecuted for an assault, an assault and battery, or an affray, to "give in evidence any opprobrious words, or abusive language, used by the person assaulted or beaten, at or near the time of the assault or affray," and declares that "such evidence shall be good in extenuation, or justification, as the jury determine" (Code, § 4900), was "intended as a shield, and not as a sword;" and it can not be invoked by a defendant who first used insulting words, and struck the first blow. *Ib.* 42.

BRIBERY.

8. *Bribery of juror; offer of "gift, gratuity, or thing of value"*.—Under the statute denouncing the offer to bribe a juror, by the promise of "any gift, gratuity, or thing of value" (Code, § 4118), a conviction may be had on proof of an offer by the defendant, while on trial for another offense, to give his labor or services to one of the jurors, if he would procure an acquittal; as, to "chop cotton for a week, if he would clear him." *Caruthers v. The State*, 406.
9. *Same; sufficiency of indictment*.—When the indictment alleges that the juror was, at the time of the offer to bribe him, engaged with eleven other jurors in the trial of the defendant for a designated offense, it is unnecessary to further allege that he had been summoned, or sworn and impanelled; and an averment that the indictment was for "disturbing females at a public assembly" (Code, § 4200), is a sufficient description of the offense for which the defendant was on trial. *Ib.* 406.
10. *Same; admissibility as evidence, of writing containing offer*.—The offer to the juror having been made in writing, which was proved to have been delivered by his request to the juror, and to which his name was signed, but not spelled as in the indictment,—as *Carethers*, instead of *Caruthers*; the writing is properly allowed to

CRIMINAL LAW—*Continued.*

go to the jury, notwithstanding the discrepancy, and although it was not addressed to the juror by name, and did not offer to work for him. *Ib.* 406.

EVIDENCE.

11. *Proof of good character; weight and effect of.*—In all criminal prosecutions, the previous good character of the defendant, having reference and analogy to the subject of the prosecution, is competent and relevant evidence for him as original testimony; but, when the jury, considering the proof of good character in connection with the criminating evidence, are satisfied beyond a reasonable doubt of his guilt, a verdict of guilty ought to follow. *Kilgore v. The State*, 1.
12. *Bad character of deceased; when admissible as evidence.*—When there is evidence tending to establish that the defendant acted in self-defense, the character of the deceased as a turbulent, violent, and blood-thirsty man, is relevant and admissible evidence for him. *Williams v. The State*, 18.
13. *Violent character of person assaulted; admissibility as evidence.*—In a prosecution for an assault and battery, where the defendant was himself the aggressor, he can not be permitted to adduce evidence of the bad character of the person assaulted, as a violent, dangerous, or turbulent man. *Brown v. The State*, 42.
14. *Abusive or insulting language; admissibility as evidence.*—The statute which allows a defendant who is prosecuted for an assault, an assault and battery, or an affray, to "give in evidence any opprobrious words, or abusive language, used by the person assaulted or beaten, at or near the time of the assault or affray," and declares that "such evidence shall be good in extenuation, or justification, as the jury determine" (Code, § 4900), was "intended as a shield, and not as a sword;" and it can not be invoked by a defendant who first used insulting words, and struck the first blow. *Ib.* 42.
15. *Statement by defendant.*—The "statement as to the facts," which the accused is permitted to make in his own behalf (Sess. Acts 1882-83, pp. 3-4), though not under oath, is in the nature of evidence, and should not be capriciously rejected by the jury, "though they may discard it as unworthy of belief, especially when it is in irreconcilable conflict with the testimony of disinterested witnesses under oath;" but the court has no power to disregard it, and is bound to consider its evidential tendencies in subsequent rulings on evidence. *Williams v. The State*, 18.
16. *Proof of ill-feeling, as showing motive.*—It is sometimes permissible to prove the enmity, or state of ill-feeling, existing between the defendant and the prosecutor, or person whose property has been injured, as tending to show a motive for the crime; but, when such evidence is admissible, the inquiry is limited to the motive or ill-feeling of the defendant himself, and does not extend to members of his family, "unless, perhaps, very special circumstances might vary the rule." *Bell v. The State*, 420.
17. *Same.*—The defendant being on trial for the arson of a mill belonging to one S., a witness for the defense was asked, on cross-examination, "the state of feeling between the defendant's family and S.'s family;" and answered, "that it was good, but some of the defendant's family did not like Mrs. S. much." Held, that the evidence was irrelevant, and ought to have been excluded. *Ib.* 420.
18. *Proof of malice; former difficulty.*—Proof of a former difficulty between the defendants and the deceased tends to show malice, and is admissible for that purpose; but the particulars or merits of that difficulty can not be inquired into. *McAnally v. The State*, 9.

CRIMINAL LAW—*Continued.*

19. *Dying declarations; admissibility of.*—Dying declarations should always be received as evidence with the greatest care and caution, and the court should rigorously scrutinize the primary facts upon which their admissibility as evidence depends; but, when these primary facts are clearly and satisfactorily shown—that the deceased was at the time *in extremis*, and that he was under a sense of impending death—the evidence must be received, leaving the jury to decide upon its weight and credibility. *Kilgore v. The State, 1.*
20. *Same.*—Dying declarations are admissible as evidence, when made under a sense of impending dissolution, although the declarant may have never expressed the conviction that he must die. *Wills v. The State, 21.*
21. *Declarations of third person; admissibility as evidence.*—The declarations of the defendant's brother, made to the prosecutor a few days before the commission of the alleged trespass, but not in the defendant's presence, nor shown to have been authorized by him, are *res inter alios actæ*, and not admissible as evidence against the defendant; and neither the relationship between the two brothers, nor the fact that they were in company when the alleged trespass was committed, is sufficient to bring such declarations within the principle which governs the admissibility of the acts and declarations of conspirators as evidence against each other. *Owens v. The State, 401.*
22. *Declarations and conduct of conspirators.*—In charges of crime which, in their nature, may be perpetrated by more than one guilty participant, if there be a previously formed purpose to commit the offense, the acts, declarations and conduct of each conspirator, in promotion of the object or purpose of such conspiracy, or in relation to it, become the acts, declarations and conduct of the others, and are competent evidence against them; but the sufficiency of such evidence must be determined by the jury, and, before it can be admitted to go to them, a foundation should be laid, by proof addressed to the court, *prima facie* sufficient to establish the existence of such conspiracy. *McAnally v. The State, 9.*
23. *Flight, and proximity to scene of crime, as evidence corroborating accomplice.*—The fact of flight, by a person accused or suspected of crime, has of itself some probative force as a criminating circumstance; and when it appears that the crime was committed at a very unseasonable hour in the middle of the night, proximity to the scene, and opportunity for committing it, are circumstances "tending to connect the accused with its commission" (Code, § 4895), as those words are used in the statute forbidding a conviction of felony on the uncorroborated testimony of an accomplice. *Ross v. The State, 532.*
24. *Corroborative evidence; when necessary.*—Corroborative evidence, as necessary to authorize a conviction on the testimony of a single witness, is only required when that witness is an accomplice (Code, § 4895); and when the jury is left in doubt as to whether the witness was in fact an accomplice, while such doubt may be considered by them in weighing his testimony, the case is not within the statute. *Ib. 532.*
25. *Weight and effect of testimony when "unreasonable and improbable."* Whether the testimony of a witness "is unreasonable and improbable," is a question for the jury; and even if the testimony is "unreasonable and improbable," it does not follow, as matter of law, that the jury must disbelieve it. *Ib. 532.*
26. *Charge as to sufficiency of evidence.*—In a criminal case, a charge requested in these words, "A probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and

CRIMINAL LAW—*Continued.*

therefore for his acquittal," asserts a correct proposition, and its refusal is an error which will work a reversal of the judgment. (*Cohen v. The State*, 50 Ala. 108, is irreconcilable with *Williams v. The State*, 52 Ala. 411, but it asserts the correct rule.) *Bain v. The State*, 38.

FORGERY.

27. *Forgery of order on merchant for goods.*—A writing addressed to a mercantile firm, in these words, "Let A., the bearer, have what articles he wants, and present bill to be paid on the 1st of month at my office," signed "George Spaulding, steamboat agent," is an instrument by which a pecuniary demand or obligation purports to be created (Code, § 4340), and the false making of which, with intent to defraud, is forgery in the second degree. *Allen v. The State*, 557.
28. *Sufficiency of indictment.*—An indictment which charges that the defendant, "with the intent to injure or defraud, did falsely make or forge an instrument" (or "an instrument in writing purporting to be the act of George S."), "in words and figures substantially as follows," setting out a written order the false making of which is forgery in the second degree, is sufficient. *Ib.* 557.
29. *Proof and presumption as to fraudulent intent and forgery.*—There being no proof of the existence of the forged order, until it was produced by the defendant and credit for goods obtained by him on the faith of it, the jury may infer an intent on his part to defraud, and, if necessary, that he forged the paper. *Ib.* 557.

GAMING.

30. *Suffering gaming on steamboat.*—Under an indictment against the captain of a steamboat, for knowingly suffering a game of cards to be played on his boat while navigating the *Mobile River* (Code, § 4212), a conviction can not be had on proof that the game was played on the boat while navigating the waters of the *Mobile Bay*. The statute is confined in terms to the rivers of the State, and the courts can not extend its provisions by construction. *Johnson v. The State*, 537.
31. *Proof of card-playing.*—A witness may testify that he saw a game played with cards, or participated in the game, without giving a particular description of it; the accuracy of his knowledge being subject to the test of a cross-examination, if desired. *Ib.* 537.

HOMICIDE.

32. *Homicide committed in attempt to rob, ravish, &c.*—A homicide committed in the attempt to perpetrate a robbery, or other felony specified in the statute (Code, § 4295), is murder in the first degree, without any consideration of malice, or a specific intent to kill. *Kilgore v. The State*, 1.
33. *Homicide with deadly weapon, by blow voluntarily given, but not aimed at person killed.*—If a blow be voluntarily or intentionally given with a deadly weapon, not in self-defense, nor under other legal excuse, and death result from the blow, "the offense can not be less than manslaughter in the first degree, and may be murder," even though the blow was not aimed at the person who was killed. *Wills v. The State*, 21.
34. *Homicide in personal combat, willingly entered into by both parties.* When two persons engage willingly in a personal combat, each having a deadly weapon, and the assailant is killed; the other party can not be held guiltless, unless he had retreated as far as he

CRIMINAL LAW—*Continued.*

- could with safety to himself; and neither the bad character of the deceased, nor past threats and hostile actions, relieve from this duty, or excuse the killing of the assailant, though they may be looked to, in connection with the present demonstrations, in determining whether the slayer had a just and reasonable apprehension of imminent peril to life, or grievous bodily harm. *Brown v. The State*, 478.
35. *Self-defense*.—There is no foundation in law for the proposition, that any violent assault, importing peril or injury to the person, may be resisted or repelled to the extremity of taking the life of the assailant; life may lawfully be taken, only in resistance of a felonious assault—that is, an assault threatening or imperilling life or grievous bodily harm. *Ib.* 478.
36. *Malice*.—Malice, whether express or implied, is not an ingredient of manslaughter; and whenever it is established to the satisfaction of the jury, beyond a reasonable doubt, there can be no conviction of any less offense than murder. *Jackson v. The State*, 26.
37. *Charge as to manslaughter*.—A charge requested which, admitting the killing with a deadly weapon, ignores the question of malice, and instructs the jury that they can not convict of a higher offense than manslaughter, is properly refused. *Ib.* 26.
38. *Dying declarations; charge as to*.—The deceased having been killed by the defendant while engaged in a hand-to-hand combat, one having a pistol, and the other a knife in his hand; the subsequent declaration of the deceased, "*I would have gotten him, if he had not been too quick for me*," can not be regarded as the mere expression of an opinion by him, but rather characterizes, as matter of fact, both the *animus* and the avidity with which he engaged in the affray; and having been admitted by the court below as dying declarations, a charge requested, instructing the jury that they "are authorized to consider the dying declaration of the deceased, in forming their conclusions as to what might have influenced the defendant's mind, as to the necessity of his striking or shooting for the preservation of his life, or to save himself from great bodily harm," is improperly refused. (BRICKELL, C. J., dissenting.) *Brown v. The State*, 478.
39. *Proof of malice; former difficulty*.—Proof of a former difficulty between the defendants and the deceased tends to show malice, and is admissible for that purpose; but the particulars or merits of that difficulty can not be inquired into. *McAnally v. The State*, 9.
40. *Dying declarations; admissibility of*.—Dying declarations should always be received as evidence with the greatest care and caution, and the court should rigorously scrutinize the primary facts upon which their admissibility as evidence depends; but, when these primary facts are clearly and satisfactorily shown—that the deceased was at the time *in extremis*, and that he was under a sense of impending death—the evidence must be received, leaving the jury to decide upon its weight and credibility. *Kilgore v. The State*, 1.
41. *Same*.—Dying declarations are admissible as evidence, when made under a sense of impending dissolution, although the declarant may have never expressed the conviction that he must die. *Wills v. The State*, 21.

INDICTMENT.

42. *For bribery; sufficiency of*.—When the indictment alleges that the juror was, at the time of the offer to bribe him, engaged with eleven other jurors in the trial of the defendant for a designated offense, it is unnecessary to further allege that he had been sum-

CRIMINAL LAW—Continued.

- moned, or sworn and impanelled; and an averment that the indictment was for "disturbing females at a public assembly" (Code, § 4200), is a sufficient description of the offense for which the defendant was on trial. *Caruthers v. The State*, 406.
43. *For forgery*.—An indictment which charges that the defendant, "with the intent to injure or defraud, did falsely make or forge an instrument" (or "an instrument in writing purporting to be the act of (George S.)," "in words and figures substantially as follows," setting out a written order the false making of which is forgery in the second degree, is sufficient. *Allen v. The State*, 557.
43. *For perjury*.—An indictment for perjury committed on a trial for a felony, which follows the statutory form (Code, § 4813; Form No. 41, p. 995), is sufficient. *Peterson v. The State*, 34.
44. *For trespass after warning*.—In a prosecution for trespass after warning (Code, § 4419), it is not necessary that the premises should be particularly described; nor is it necessary that they should be particularly described in the notice or warning given to the defendant. *Owens v. The State*, 401.
45. *Indorsements on indictment; variance in spelling foreman's name*.—When the record affirmatively shows that the indictment was returned into court, indorsed and filed, as required by the statute (Code, § 4821), a variance in the spelling of the foreman's name, as copied in the indorsements, is immaterial, when the names are strictly *idem sonans*. *Jackson v. The State*, 26.
46. *Objections to verity of indictment*.—Objections to the genuineness of an indictment as a court record must be raised in the court below, before pleading to the merits, by timely motion to quash, or to strike the paper from the files; and can not be raised, for the first time, in this court. *Ib.* 26.
47. *Motion to quash*.—A motion to quash an indictment is, generally, addressed to the sound discretion of the court, and its refusal is not revisable on error or appeal; and if there be exceptions to this general rule, the record in this case does not present one, the motion to quash being founded on the failure of the clerk to mark the indictment filed, as ordered by the court. *White v. The State*, 31.

JURORS AND JURY.

48. *Organization of grand jury*.—In the organization of the grand jury, when less than fifteen of the original *venire* appear, or the number of those appearing is from any cause reduced below fifteen, the court is authorized and required to make an order for the summons of "twice the number of persons required to complete the grand jury" (Code, § 4754); and the court may, in the exercise of this power, order the summons of twice as many persons as are necessary to make the number of grand jurors fifteen, eighteen, or any intermediate number. *Kilgore v. The State*, 1.
49. *Oath of grand jury; sufficiency of recitals as to*.—When the record recites that the oath prescribed by the statute was taken by the foreman and the other members of the grand jury, the recital implies that the oath was administered by the court, or in its presence, and under its sanction, and is sufficient. *Brown v. The State*, 478.
50. *Special venire; presumption as to return of*.—It is not necessary that the record, in a capital case, shall show that the special *venire* was returned into court by the proper officer; when no objection was raised in the court below, based on the failure to return it, and the defendant participated in the selection of the petit jury, this court will presume that the return was properly made, or that it was waived. *Ib.* 478.

CRIMINAL LAW—*Continued.*

51. *Competency of coroner as juror.*—A person filling the office of coroner may, as a personal privilege, claim exemption from service as a juror (Code, § 4734); but he may waive this privilege, and is not subject to challenge for cause on account of it. *Jackson v. The State*, 26.
52. *Competency of juror opposed to capital punishment on circumstantial evidence.*—The statute making it good cause of challenge by the State, that a person "has a fixed opinion against capital punishment, or thinks that a conviction should not be had on circumstantial evidence" (Code, § 4883); a person who states, on his *voir dire*, that he is not opposed to a conviction on circumstantial evidence, but is opposed to punishing capitally on such evidence, is subject to challenge for cause, when the indictment charges a capital felony. *Ib.* 26.
53. *Organization of petit jury; objection to action of court made at instance of objector.*—In a criminal case, the defendant can not be heard to complain, on error, that the court ordered more than the necessary number of talesmen to be summoned to complete the petit jury, when the record affirmatively shows that this was done at his instance and request. *Allen v. The State*, 557.
54. *Oath of petit jury.*—A recital in the judgment-entry that the jury was "duly sworn," or "sworn according to law," without more, is sufficient; but, where the recital is that the jury was "sworn and charged well and truly to try the issue joined," without more, this does not show a substantial compliance with the statutory oath (Code, § 4765), and the error will work a reversal of the judgment. *Peterson v. The State*, 34; *Johnson v. The State*, 537.

PERJURY.

55. *Sufficiency of indictment.*—An indictment for perjury committed on a trial for a felony, which follows the statutory form (Code, § 4813; Form No. 41, p. 995), is sufficient. *Peterson v. The State*, 34.
56. *Sufficiency and relevancy of evidence.*—To authorize a conviction for perjury, there must be two witnesses, or one witness with strong corroboration; and when the perjury charged consists of alleged false testimony given under oath as a witness on a trial for perjury, while it is competent for the prosecution to prove contradictory statements, as to the same facts, made by the defendant when examined as a witness before the grand jury, a conviction can not be had on proof of these former statements, unless their truth is substantiated by other evidence. *Ib.* 34.

PLEAS AND DEFENSES.

57. *Alibi.*—When an *alibi* is set up as a defense, a charge to the jury, given at the instance of the prosecuting officer, asserting that "it is essential to the sufficiency of such defense that it cover and account for so much of the time of the transaction as to render it impossible the prisoner could have committed the offense," lays down too exacting a rule. *McAnally v. The State*, 9.
58. *Same.*—An unsuccessful attempt to prove an *alibi*, in a criminal case, is not "always a circumstance of great weight against the prisoner, because the resort to that kind of evidence is an admission of the truth of the facts alleged, and the correctness of the inferences drawn from them, if they remain uncontradicted" (*Porter v. The State*, 55 Ala. 105); yet such failure, like the failure to prove or explain any other material fact, which the defendant had (or is presumed to have had) the means of proving or explaining, is a circumstance to be weighed and considered by the jury, in determining the question of his guilt. *Kilgore v. The State*, 1.

CRIMINAL LAW—Continued.

59. *Misnomer, and variance.*—The names *Booth* and *Boothe* are strictly *idem sonans*.—*Jackson v. The State*, 26.
60. *Joinder in issue.*—The *similiter*, or joinder by the State in the issue tendered by the plea of not guilty, is merely a formal matter, and the failure of the record to recite it is an amendable defect. *Brown v. The State*, 478.

TRESPASS AFTER WARNING.

61. *Description of premises in indictment, and in notice.*—In a prosecution for trespass after warning (Code, § 4419), it is not necessary that the premises should be particularly described in the indictment; nor is it necessary that they should be particularly described in the notice or warning given to the defendant. *Owens v. The State*, 401.
62. *Sufficiency of notice, or warning.*—Warning, as the term is used in the statute, implies actual notice, brought home to the party sought to be charged, and constructive notice (as, by written or printed notices posted on or near the premises, or knowledge of facts sufficient to put a party on inquiry) is not sufficient; but notice may be established by circumstantial evidence, and notoriety in the neighborhood, though not conclusive, is admissible for the consideration of the jury. *Ib.* 401.
63. *Continuous act, not ground for election.*—A single entry on the premises, though followed by several acts as the defendant moved about, or was seen at different places, is but a single trespass, and presents no ground for compelling an election by the prosecution. *Ib.* 401.
64. *Legal cause or excuse, as defense; burden of proof as to.*—“Legal cause, or lawful excuse” for the alleged trespass, is defensive matter, which the prosecution is not required to negative, but which must be affirmatively proved by the defendant, unless the testimony which proves the act also proves the excuse. *Ib.* 401.
65. *Declaration of third person; admissibility as evidence.*—The declarations of the defendant's brother, made to the prosecutor a few days before the commission of the alleged trespass, but not in the defendant's presence, nor shown to have been authorized by him, or even to have been communicated to him, are *res inter alios acta*, and not admissible as evidence against the defendant: and neither the relationship between the two brothers, nor the fact that they were in company when the alleged trespass was committed, is sufficient to bring such declarations within the principle which governs the admissibility of the acts and declarations of conspirators as evidence against each other. *Ib.* 401.

VERDICT AND JUDGMENT.

66. *General verdict, on indictment containing two or more counts.*—When an indictment for murder contains two or more counts, differing only in the description of the means or instrument by which the homicide was committed, the jury can not be required to specify in their verdict on which count it is founded. *Kilgore v. The State*, 1.
67. *Same.*—When an indictment contains two or more counts, each charging the commission of the same offense, but with different means or instruments, the jury are not bound to acquit, because they may entertain a reasonable doubt as to which of the means or instruments was used; nor can they be required, by instructions on the part of the court, to specify in their verdict the particular count on which it is founded. (Limiting *Givens v. The*

CRIMINAL LAW—*Continued.*

- State*, 5 Ala. 747, to cases in which different offenses are charged in the several counts, and in which the prosecution might be compelled to elect.) *Jackson v. The State*, 26.
68. *Same*.—Where the indictment charges the offense in the alternative—as, living in adultery or fornication—the jury can not be required, by instructions on the part of the court, to specify in their verdict the alternative on which it is founded. *White v. The State*, 31.
69. *Conviction of attempt to commit offense charged*.—When the evidence fails to show consummation of the offense charged, the defendant may nevertheless be convicted of an attempt to commit it (Code, § 4904); consequently, in such case, the court may refuse to instruct the jury that, if they believe the evidence, they must acquit the defendant. *Burke v. The State*, 399.
70. *Confession of judgment, as release of errors*.—In a criminal case, the confession of a judgment with sureties for the fine and costs, as authorized by statute (Code, §§ 4454–55), is not a release of errors, and does not prejudice the right to revise the judgment by appeal or writ of error; though a different rule is declared by statute (*Ib.* § 3945) in civil cases. *Ib.* 399.
71. *Estoppel against assailing judgment by confession*.—When a judgment by confession in a criminal case is improperly entered against a surety, on a power of attorney substantially defective, and an execution issued thereon is levied on his property, if he then obtains a postponement of the sale, by promising to pay a part of the judgment within thirty days, and the residue by another day, he thereby estops himself from afterwards assailing the validity of the judgment on account of the defective power of attorney. *Giddens v. Crenshaw County*, 471.
72. *Power of attorney to confess judgment as surety for fine and costs*.—A writing, addressed to the sheriff, in these words: "I propose to go on J. M.'s security for costs and fine, in case he is convicted, jointly with B. R.,"—is not, it seems, sufficiently definite and specific as a power of attorney to authorize a judgment by confession against the writer, jointly with B. R., for the fine and costs imposed on J. M. *Ib.* 471.
73. *Sentence to penitentiary*.—Under a conviction of a felony, a sentence to hard labor in the penitentiary is, in substance and legal effect, no more than a sentence to imprisonment in the penitentiary, and contains no reversible error. *Brown v. The State*, 478.

DAMAGES.

1. *Appeal bond; what damages are recoverable*.—An appeal bond, given in pursuance of the order of the presiding judge (Code, § 3928), on appeal from a judgment for the recovery of land or the possession thereof, and conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers all damages resulting to the plaintiff from the appeal and its legal consequences and incidents; that is, all damages of which the appeal is the moving cause, or the direct and immediate agency producing them; and this includes the value of the use and occupation of the premises pending the appeal, of which the plaintiff was deprived by the suspension of a writ of possession on the judgment. *Cahall v. Mutual Building Asso.*, 539.
2. *Attorney's fees, costs, travelling expenses, &c., as damages*.—In an action on a statutory bond given by the plaintiff in detinue (Code, § 2942), attorney's fees, and costs incurred in that suit (if not previously recovered), as well as any damages actually sustained from the seizure and detention of the property, are legitimate subjects

DAMAGES—Continued.

- of recovery ; but loss of time, and hotel bills paid, while engaged in procuring sureties on the replevin bond, or in attendance on the trial, are too remote and variable. *Foster v. Napier*, 393.
3. *Attorney's fees as damages*.—Attorney's fees, for services rendered in procuring a dissolution of the injunction, are not recoverable as damages in an action on the injunction bond, unless averred and claimed as special damages in the complaint. *Washington v. Timberlake*, 252.
 4. *Recoupment, and set-off*.—A claim of recoupment spring out of the contract or transaction on which the action is founded ; a set-off is in the nature of a cross action, and may be a separate and independent demand not connected with the original cause of action. *Ib.* 259.

DEEDS.

1. *Description of premises conveyed*.—When a conveyance of lands contains both a general and a particular description of the premises, and the two are repugnant to each other, the particular description will control, and the other will be rejected as false. *Sikes v. Shows*, 382.
2. *Same ; parol evidence identifying premises sold*.—When the premises conveyed are described in the deed as " Lot No. 2, of Square No. 8, in the town of R., being twenty feet in front, and running back one hundred and ten feet," and it is shown that the lot is in fact thirty feet front, parol evidence is admissible to show that the part sold and intended to be conveyed, and of which possession was delivered to the grantee, was the twenty feet front on the east side of the lot. *Ib.* 382.
3. *Acknowledgment of conveyance, without attestation*.—The acknowledgment of a deed dispenses with the necessity of attestation (Code, § 2146), even when the grantor makes his signature by mark only. *Ib.* 382.
4. *Proof of delivery of deed*.—The possession of a deed by the grantee, unexplained, or un rebutted, may be *prima facie* sufficient proof of its delivery ; but, when the grantee is the widow of the grantor, and it is shown by her testimony, taken in another suit, in which the deed was offered in evidence, that she found it among her husband's papers after his death, it being then unattested, and the signature of the only attesting witness being afterwards affixed at her request,—this is not sufficient to establish the deed, as in favor of a subsequent purchaser, seeking to enforce it against her heirs. *Goodlett v. Kelly*, 213.
5. *Sufficiency of conveyance in description of land*.—" Ten acres off the north-west corner of said quarter-section," when the words are used to designate a tract of land, is not an indefinite and uncertain description, but means the ten acres in the corner, lying in a square, and bounded by four equal sides ; but, when the only descriptive words used are, " Ten acres, more or less, of said quarter-section," the conveyance is void for uncertainty as a muniment of title. *Wilkinson v. Roper*, 140.

DEPOSITIONS.

1. *Deposition of witness present in court*.—When a witness, whose deposition has been taken, is personally present in court at the trial, and is competent to testify, his deposition should be suppressed, and he should be examined orally. *Humes v. O'Bryan & Washington*, 64.
2. *Continuance on terms as to taking depositions*.—In the exercise of its discretionary power to grant continuances " upon such terms as to

DEPOSITIONS—*Continued.*

the court shall seem proper" (Rule No. 16, Code, p. 160), the court may, in granting a continuance to the defendant, order that the plaintiff, "in consideration of said continuance," be allowed to take the depositions of certain named witnesses, "on filing interrogatories and giving notice as in such cases required by law," dispensing with a preliminary affidavit. *Ib.* 64.

3. *Depositions taken before answer.*—Depositions in a chancery cause, taken before the cause is at issue as against an infant who is a material defendant, will be disallowed as evidence against him, and no motion to suppress them is necessary. *Daily's Adm'r v. Reid*, 415.

DETINUE.

1. *Who may maintain action.*—To maintain the action of detinue, or the corresponding action for the recovery of personal property *in specie*, the plaintiff must have the legal title, and a right to the immediate possession of the entire chattel sued for. *Graham v. Myers & Co.*, 432.
2. *Against whom action lies.*—The action does not lie against a person who was not in possession of the chattel at the commencement of the suit. *Ib.* 432.
3. *Bond; what damages may be recovered.*—In an action on a statutory bond given by the plaintiff in detinue (Code, § 2942), attorney's fees, and costs incurred in that suit (if not previously recovered), as well as any damages actually sustained from the seizure and detention of the property, are legitimate subjects of recovery; but loss of time, and hotel bills paid, while engaged in procuring sureties on the replevin bond, or in attendance on the trial, are too remote and variable. *Foster v. Napier*, 393.

DOWER.

1. *Alienation by widow, before dower assigned.*—Until dower is assigned to the widow, she has the right to retain, free from the payment of rent, possession of the dwelling-house in which her husband most usually resided next before his death (Code, § 2238); but she has no specific estate or interest which she can assign to another, and the heir may recover against her alienee, although he could not disturb her possession before an assignment of dower. *Barber v. Williams*, 331.
2. *Value of wife's inchoate right of dower; how ascertained; judicial knowledge of Annuity Tables.*—There is no way in which the value of the wife's inchoate or contingent right of dower in her husband's lands can be proved, with any degree of accuracy, except by a calculation based on what are commonly called "Annuity Tables," the "American Table of Mortality" being now regarded as the orthodox standard throughout the United States; judicial notice of which table may be taken by the chancellor, or by the register on a reference. *Gordon, Rankin & Co. v. Tweedy*, 233.
3. *Same; when separate estate not to be computed.*—In estimating the value of the wife's dower interest in her husband's lands, when perfected by his death, the value of her statutory estate must be computed and deducted (Code, §§ 2715-16); but this principle has no application, where it is necessary to estimate the value of her inchoate interest in a tract of land, the relinquishment of which formed the consideration of the husband's conveyance of another tract to her, which conveyance is assailed by creditors. *Ib.* 233.
4. *Loan of money to pay purchase-money of land; rights of lender, as against purchaser's widow.*—A person who lends or advances money to pay the purchase-money for lands, or to pay a decree

DOWER—*Continued.*

which the vendor has obtained subjecting the land to sale in satisfaction of his lien, and who takes a mortgage or deed of trust on the lands to secure the re-payment of the money, can not claim to be subrogated to the vendor's lien on the land, nor to have the decree revived and enforced in his favor; and the wife of the purchaser not joining with her husband in the execution of the mortgage or deed of trust, her right to dower in the lands is superior to the rights and equities of the lender. *Pettus v. McKinney*, 108.

EASEMENT.

1. *License to lessee, to pass through lessor's lands.*—The lessee of rented lands, which are accessible from the public road, has no right to use a shorter route across the other lands of the lessor, without his permission, express or implied; and if such permission can be implied from his use of the shorter route without objection, it is only a parol license, and revocable at pleasure; and after revocation by express prohibition or warning, the further use of the shorter route, by either the lessee or his tenants and servants, is a trespass. *Motes v. Bates*, 374.

EJECTMENT.

1. *Plea of not guilty, and disclaimer.*—In a statutory action in the nature of ejectment, the plea of not guilty is a conclusive admission of the defendant's possession of the land sued for, and a denial of the plaintiff's title thereto (Code, §§ 2962-3); while a disclaimer is an admission of plaintiff's title, and a denial of defendant's possession; and these two defenses being incompatible, can not be pleaded together in the same action. *McQueen v. Lampley*, 408.
2. *Same, where question is as to location of boundary line.*—Where the land in controversy is a narrow strip lying along the section line which divides the lands of the two parties, each claiming it as a part of his section, and the complaint describing it as a part of the plaintiff's section; the plea of not guilty being a conclusive admission of the defendant's possession of the land sued for, he can not be permitted to prove that said land was not in fact a part of plaintiff's section, as averred in the complaint; while a disclaimer, if not controverted, would entitle plaintiff to judgment for the land, without damages or costs, and leave the location of the boundary line to the sheriff, assisted, perhaps, by a surveyor; thus operating a hardship on the defendant, which suggests the propriety of legislative interference. *Id.* 403.
3. *Award, as evidence of title to land.*—When a pending suit, involving the title to land, or the right of possession for a term not yet expired, is submitted to arbitration, the award rendered, though it can not have the operation and effect of a conveyance of lands, is evidence of title, which will support or defeat an action of ejectment, or a statutory action in the nature of ejectment: but, when set up by the defendant, it is only matter of evidence, available under the plea of not guilty, is open to contestation, and must be determined by the jury, unless a trial by jury is waived. *Moore v. Helms*, 368.
4. *Title acquired by defendant after commencement of suit.*—Since the plaintiff in ejectment, or the statutory action in the nature of ejectment, must show title in himself at the commencement of the suit, and also at the time of the trial; the defendant may defeat a recovery, under a plea *pais darrein continuance*, by showing title in himself acquired or perfected after the commencement of the suit. *Pollard v. Hanrick*, 334.

EJECTMENT—*Continued.*

5. *Verbal admission as to title to land.*—In ejectment, or the statutory action in nature of ejectment, both parties claiming through mesne conveyances from the same person, one of the plaintiff's deeds having been lost or destroyed, and the secondary evidence being conflicting as to the form and sufficiency of its execution, plaintiff's verbal admission that he never had any title to the land, or any interest therein, is relevant and competent evidence for the defendant. *Allred v. Kennedy*, 326.
6. *Same.*—So, although the mere return of a deed by the grantee to the grantor would not effect a divestiture of the title, the plaintiff may be asked "if he did not return the land papers to said C.," his vendor; the fact of such return being relevant to the question, whether they were not worthless as a conveyance. *Ib.* 326.
7. *Permanent improvements by adverse possessor.*—"Adverse possession," as the words are used in the statute which gives to the defendant in ejectment, or the statutory action in the nature of ejectment, the right to suggest upon the record that he and those whose possession he has "have had adverse possession" for three years before the commencement of the suit, and have erected permanent improvements on the land (Code, §§ 2951-54), "must be construed to mean just the same character of hostile possession as will put in operation the statute of limitations, except that it must be *bona fide* under color or claim of title;" and a purchaser from the tenant for life, though his deed purports to convey the absolute property, can not claim the benefit of the statute, in an action brought by the remainder-man within three years after the death of the tenant for life. *Pickett v. Pope*, 122.

ELECTION.

1. *When binding.*—To make an election binding, the party must have knowledge of the facts between which he is required to choose; and hence, when the holder of a note, given for the purchase-money of land, is a non-resident, the recovery by him of a judgment on the note can not be deemed a renunciation of promises to pay it by sub-purchasers of the land, when it is not shown that he had knowledge of such promises. *Young v. Hawkins*, 370.
2. *By distributees;* when estate has been kept together by administrator without authority. *Hinson v. Williamson*, 180.
3. *By mortgagor,* when mortgagee purchases at sale under power. *Garland v. Watson*, 323.
4. *By prosecution,* in criminal case; continuous act no ground for. *Owens v. The State*, 401.

ERROR AND APPEAL.

1. *Limitation of appeal.*—Thirty days being the limitation of an appeal from a judgment or decree on a contest of the probate of a will (Code, § 3954), an appeal sued out on 5th April, from a judgment rendered on 4th March, will be dismissed on motion. *Lanier v. Russell*, 364.
2. *When appeal lies.*—An appeal lies only from a final decree, except where the statutes expressly give an appeal from an interlocutory decree. *Wilkinson v. Searcy*, 243.
3. *Same.*—When the chancellor improperly sets aside or modifies, at a subsequent term, a final decree rendered at a former term, the remedy is by *mandamus*, and an appeal does not lie. *Cochran v. Miller*, 50.
4. *Same.*—Although the rendition or amendment of a judgment *nunc pro tunc* is the correction of a mere clerical error or misprision, an

ERROR AND APPEAL—*Continued.*

- appeal lies from the order or judgment allowing it. *M. & C. Railroad Co. v. Whorley*, 264.
5. *Same*.—When the widow's claim to a homestead exemption is contested by a creditor of her deceased husband, and the contest is removed into the Circuit Court for trial, an appeal to this court does not lie from the judgment of the Circuit Court (Code, § 2841), but must be taken from the subsequent judgment of the Probate Court; and an appeal taken from that court, before any subsequent proceedings are had, will be dismissed. *Coffey v. Joseph*, 271.
 6. *Non-suit; when revisable*.—Under the settled construction of the statute (Code, § 3112), a voluntary nonsuit, taken in consequence of an adverse ruling on demurrer, not being a matter to which a bill of exceptions can properly be taken, is not revisable. *Perry v. Danner & Co.*, 485.
 7. *Appeal bond; payable to register*.—When an appeal bond, in a chancery case, is made payable to the register, instead of the appellee, a judgment for costs can not be rendered against the sureties, on an affirmance, the only remedy against them being by action on the bond. *The State v. City Council of Montgomery*, 226.
 8. *Same; what damages are recoverable*.—An appeal bond, given in pursuance of the order of the presiding judge (Code, § 3928), on appeal from a judgment for the recovery of land or the possession thereof, and conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers all damages resulting to the plaintiff from the appeal and its legal consequences and incidents; that is, all damages of which the appeal is the moving cause, or the direct and immediate agency producing them; and this includes the value of the use and occupation of the premises pending the appeal, of which the plaintiff was deprived by the suspension of a writ of possession on the judgment. *Cahall v. Mutual Building Asso.*, 539.
 9. *Contents of transcript*.—The bill of exceptions reserved on a former trial being no part of the transcript on a second appeal, no costs will be allowed for it. *Allred v. Kennedy*, 326.
 10. *Transcript, and costs thereof*.—The court complains of the confused state of the transcript in this case, and orders that no costs shall be allowed for it. *Foster v. Napier*, 395.
 11. *Costs of return to certiorari*.—A *certiorari* having been granted in this case, to perfect the record by showing the organization of the grand jury and other proceedings, it was ordered, that the clerk be allowed no costs for the return. *Bell v. The State*, 420; *Ross v. The State*, 532.
 12. *Original documents; how brought to appellate court*.—Original books and papers may be sent up to this court for inspection, by order of the court below (Rule No. 20; Code, p. 157); but this does not authorize their omission from the transcript as a part of the record; and while the parties may, by agreement of record (71 Ala. iv), omit from the transcript such parts of the proceedings as are deemed immaterial to the proper consideration of the questions presented by the appeal, there is no rule of practice which authorizes the omission, by agreement, of documents deemed material, and the substitution of the originals for the consideration of this court. *Pruitt v. McWhorter*, 315.
 13. *Confession of judgment, as release of errors*.—In a criminal case, the confession of a judgment with sureties for the fine and costs, as authorized by statute (Code, §§ 4454-55), is not a release of errors, and does not prejudice the right to revise the judgment by appeal or writ of error; though a different rule is declared by statute (1 b. § 3945) in civil cases. *Burke v. The State*, 399.

ERROR AND APPEAL—*Continued.*

14. *What is revisable.*—The refusal to allow a witness to be recalled, for the purpose of laying a predicate to impeach him, is within the discretion of the primary court, and is not revisable. *Bell v. The State*, 420.
15. *Errors not injurious to appellant.*—When errors are assigned by one only of several appellants, this court will only consider errors which are prejudicial to him. *Wilkinson v. Searcy*, 243.
16. *Error without injury in rulings against plaintiff.*—When the record shows that the plaintiff never can recover, rulings against him by the court below, however erroneous, can not injure him, and are no ground of reversal. *Jackson v. Bain*, 328.
17. *Same, in admission of evidence.*—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy or admissibility was established by evidence subsequently introduced. *Belmont Coal & Railroad Co. v. Smith*, 206.
18. *Same, in statement of account.*—On statement of the accounts of a deceased administrator, under a bill filed by his personal representative, an overcharge against him, or the refusal of a proper credit, is error without injury, when the record shows that the distributees remitted a larger balance found against him; the *remittur*, in such case, will be referred to, and will cure, the specific errors in the account. *Hinson v. Williamson*, 180.
19. *Revision of chancellor's decision on facts.*—The burden of proof being on a party who asserts an estoppel *en pais*, and the evidence being conflicting, if the chancellor holds the evidence insufficient to establish it, this court will not reverse his ruling, "unless clearly convinced that he erred." *Wilkinson v. Searcy*, 243.
20. *Presumption in favor of decree.*—Where a decree is rendered on pleadings and proof, and the testimony is not set out in the record, this court will presume that the decree was sustained by the proof. *Toon v. Finney*, 343.
21. *Presumption in favor of judgment.*—When an exception is reserved to the exclusion of evidence, which is not set out, and the relevancy and materiality of which are not shown, this court will presume that it was properly rejected. *Perry v. Danner & Co.*, 485.
22. *Same.*—In the absence of a recital to the contrary, and exception duly reserved, this court will presume that charges requested, and given or refused, were indorsed accordingly, as required by the statute. *Allen v. The State*, 557.
23. *Same.*—In a criminal case, no objection being raised in the court below based on the failure to return the special venire, this court will presume that the return was properly made, or that it was waived. *Brown v. The State*, 478.
24. *Ruling or action at instance of appellant.*—In a criminal case, the defendant can not be heard to complain, on error, that the court ordered more than the necessary number of talesmen to be summoned to complete the petit jury, when the record affirmatively shows that this was done at his instance and request. *Allen v. The State*, 557.
25. *Judicial decisions overruling former decisions; effect on titles and contracts.*—When titles have been acquired, judgments rendered, contracts performed, or transactions completed, based on judicial decisions which are afterwards overruled or reversed, titles and rights thereby acquired are not annulled or affected by such change in the judicial decisions; but this principle can not be so applied as to require that legal effect and operation shall be given to a conveyance according to the judicial decisions of this court which were of force when it was executed, which decisions were in conflict with repeated former adjudications, and have since been expressly

ERROR AND APPEAL—*Continued.*

overruled by later cases declaring and re-establishing the former decisions. *Kelly v. Turner*, 513.

ESTATES OF DECEDENTS.

1. *Sale of decedent's lands, for payment of debts; conclusiveness of order on collateral attack.*—When a sale of lands by an administrator under a probate decree, for the payment of debts, is collaterally attacked,—as where the heirs bring ejectment against a person claiming under the sale,—mere irregularities in the proceedings are not available, and the heirs can not recover unless the sale is void. *May v. Marks*, 249.
2. *Same; validity of grant of administration.*—The granting of the order of sale, on the petition of a person claiming to be the administrator, involves a judicial determination of the fact that he is such administrator; and the heirs can not impeach the sale, on such collateral proceeding, on the ground that his appointment was invalid, or that his office had expired. *Ib.* 249.
3. *Same; payment of purchase-money, and notice to heirs.*—When the payment of the purchase-money is reported to the court by the administrator, the sale confirmed, and he is ordered, on his own application, to execute a conveyance to the purchaser, the failure to notify the heirs of any or all of these proceedings does not render the sale void, and is not available to the heirs on a collateral attack; nor can they be permitted to contradict, by oral evidence, the recitals of the record as to the payment of the purchase-money. *Ib.* 249.
4. *Sale of lands, for distribution; conclusiveness of order on collateral attack, and presumptions in favor of.*—When a sale of lands by an administrator under a probate decree, for distribution, is collaterally attacked,—as where the heirs bring ejectment against a person claiming under the sale,—mere irregularities in the proceedings, which would be available on demurrer, or on error or appeal, will not avoid the sale; and a liberal construction will be placed upon the language used, in order to sustain the jurisdiction of the court. *Pollard v. Hanrick*, 334.
5. *Same; sufficiency of petition.*—An allegation in the petition that the lands “can not be equally, equitably divided” without a sale, being liberally construed, is the equivalent of an allegation that they can not be “equitably divided” without a sale (Code, § 2449), and is sufficient to sustain the jurisdiction of the court to grant the order. *Ib.* 334.
6. *Same; execution of conveyance to purchaser.*—In reference to such sales, the theory of the law is, that the court itself is the vendor, and the person authorized to execute a deed to the purchaser is merely its agent, or instrument; and if the administrator dies without having executed a conveyance as ordered, after the purchase-money has been paid and the sale confirmed, the court may appoint and authorize another person to execute a conveyance. *Ib.* 334.

See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. *Between landlord and tenant.*—As a general rule, when a tenant is sued for rent, or for the possession on the expiration of his term, he can not dispute the title of his landlord, nor set up a paramount title in himself or a third person; but he may show that the landlord's title has expired by limitation, or by operation of law; or

ESTOPPEL—Continued.

- that he accepted a lease, or attorned to the plaintiff as landlord, under a mistake of fact, and in ignorance that the title was in himself; or that he was induced to attorn, or to accept a lease, through fraud, imposition, or undue advantage; or that he has been evicted by title paramount. *Farris & McCurdy v. Houston*, 162.
2. *Between mortgagor and mortgagee, and their privies in estate.*—A tenant who has entered under the mortgagee, or under an assignee of the mortgagee, can not defeat a recovery by his landlord, by showing the subsequent grant of letters of administration to himself on the estate of the deceased mortgagor, and the insolvency of the estate, and claiming an extinguishment of the mortgage debt by the rents and profits received. *Ib.* 162.
 3. *By judgment on confession.*—When a judgment by confession in a criminal case is improperly entered against a surety, on a power of attorney substantially defective, and an execution issued thereon is levied on his property, if he then obtains a postponement of the sale, by promising to pay a part of the judgment within thirty days, and the residue by another day, he thereby estops himself from afterwards assailing the validity of the judgment on account of the defective power of attorney. *Giddens v. Crenshaw County*, 471.
 4. *Estoppel en pais against maker of note.*—If a person who is about to purchase, or take an assignment of a promissory note, applies to the maker for information, is assured by him that there is no defense against it, and buys the note on the faith of that representation, the maker is estopped from setting up against him any defense which then existed. *Wilkinson v. Searcy*, 243.
 5. *Innocent sufferers by wrongful act of third person.*—Whenever one of two innocent persons must suffer by the wrongful act of a third person, he must bear the loss who enabled the third party to cause it. *Noble v. Moses Brothers*, 605.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Action for malicious prosecution; infancy of plaintiff.*—In an action for a malicious prosecution, the fact that the plaintiff was a minor at the time of the assault and battery by him, on which the prosecution was founded, is not relevant to the issue of malice or probable cause, and is not admissible as evidence. *Motes v. Bates*, 374.
2. *Same; conduct of prosecutor connected with arrest.*—The conduct and movements of the prosecutor on the day of the plaintiff's arrest, while he was in the custody of the sheriff and attempting to give bail, are competent evidence for the plaintiff, as tending to show the degree of interest on the part of the defendant in the prosecution, and bearing on the question of an improper motive on his part. *Ib.* 374.
3. *Proof of ill-feeling, as showing motive.*—It is sometimes permissible to prove the enmity, or state of ill-feeling, existing between the defendant and the prosecutor, or person whose property has been injured, as tending to show a motive for the crime; but, when such evidence is admissible, the inquiry is limited to the motive or ill-feeling of the defendant himself, and does not extend to members of his family, "unless, perhaps, very special circumstances might vary the rule." *Bell v. The State*, 420.
4. *Same.*—The defendant being on trial for the arson of a mill belonging to one S., a witness for the defense was asked, on cross-examination, "the state of feeling between the defendant's family and S.'s family;" and answered, "that it was good, but some of the defendant's family did not like Mrs. S. much." *Held*, that the evidence was irrelevant and ought to have been excluded. *Ib.* 420.

EVIDENCE—Continued.

5. *Proof of malice; former difficulty.*—Proof of a former difficulty between the defendants and the deceased tends to show malice, and is admissible for that purpose; but the particulars or merits of that difficulty can not be inquired into. *McAnally v. The State*, 9.
6. *Proof of good character; weight and effect of.*—In all criminal prosecutions, the previous good character of the defendant, having reference and analogy to the subject of the prosecution, is competent and relevant evidence for him as original testimony; but, when the jury, considering the proof of good character in connection with the criminating evidence, are satisfied beyond a reasonable doubt of his guilt, a verdict of guilty ought to follow. *Kilgore v. The State*, 1.
7. *Bad character of deceased; when admissible as evidence.*—When there is evidence tending to establish that the defendant acted in self-defense, the character of the deceased as a turbulent, violent, and blood-thirsty man, is relevant and admissible evidence for him. *Williams v. The State*, 18.
8. *Violent character of person assaulted; admissibility as evidence.*—In a prosecution for an assault and battery, where the defendant was himself the aggressor, he can not be permitted to adduce evidence of the bad character of the person assaulted, as a violent, dangerous, or turbulent man. *Brown v. The State*, 42.
9. *Flight, and proximity to scene of crime, as evidence corroborating accomplice.*—The fact of flight, by a person accused or suspected of crime, has of itself some probative force as a criminating circumstance; and when it appears that the crime was committed at a very unseasonable hour in the middle of the night, proximity to the scene, and opportunity for committing it, are circumstances "tending to connect the accused with its commission" (Code, § 4895), as those words are used in the statute forbidding a conviction of felony on the uncorroborated testimony of an accomplice. *Ross v. The State*, 532.
10. *Telegrams; proof of partnership.*—When the contract sued on was negotiated and consummated between the parties by telegraph, the several dispatches, as written instruments, must be construed by the court; but, when they passed between other persons, and are not the foundation of the action, they may be relevant evidence of a collateral fact, and may be submitted to the jury for that purpose; as to establish the fact of partnership, where they related to the existence and solvency of the alleged partnership, and the answer to inquiries was sent with the consent of the defendant sought to be charged. *Humes v. O'Bryan & Washington*, 64.

ADMISSIONS; DECLARATIONS; HEARSAY; RES GESTE.

11. *Admission implied from silence.*—Plaintiffs having written to defendant in reference to their account, on which the action is founded, addressing him as a partner with the person, since deceased, by whom the business was carried on; his failure to answer the letter would, if unexplained, operate as an implied admission on his part of the fact of partnership. *Humes v. O'Bryan & Washington*, 64.
12. *Appraised value of animal killed, as admission against owner, and explanation thereof.*—The plaintiff having procured appraisers to value his horse which was killed, and to certify to the correctness of his claim at their valuation against the railroad company, this appraisement is an admission on his part of the value of the horse as stated; but it is subject to be explained, or rebutted, by proof of any fact connected with the appraisement which is admissible as a part of the *res gesta*; as, that he told them to put the lowest

EVIDENCE.—*Continued.*

- cash value on the animal, not exceeding the sum fixed by them, because the agent of the railroad company had promised that the claim should be paid at once without abatement. *Railroad Co. v. Bayliss*, 150.
13. *Admission as to testimony of absent witness.*—An admission, made for the purpose of preventing a continuance, that an absent witness would, if present, testify as set forth in the affidavit submitted, is not an admission of his competency, nor of the relevancy of the facts as evidence; nor is it admissible for any purpose, on a trial at a subsequent term, although the witness has since died. *Ryan v. Beard's Heirs*, 306.
 14. *Agreement as to testimony of absent witness.*—When there is an agreed statement as to the testimony of a witness supposed to be absent, but who comes into court during the trial, the statement should be suppressed, if duly objected to, and the witness examined orally; but the objection is waived, if not interposed until after the statement has been read to the jury. *Allred v. Kennedy*, 326.
 15. *Verbal admission as to title to land.*—In ejectment, or the statutory action in nature of ejectment, both parties claiming through mesne conveyances from the same person, one of the plaintiff's deeds having been lost or destroyed, and the secondary evidence being conflicting as to the form and sufficiency of its execution, plaintiff's verbal admission that he never had any title to the land, or any interest therein, is relevant and competent evidence for the defendant. *Ib.* 326.
 16. *Same.*—So, although the mere return of deed by the grantee to the grantor would not effect a divestiture of the title, the plaintiff may be asked "if he did not return the land papers to said C.," his vendor; the fact of such return being relevant to the question, whether they were not worthless as a conveyance. *Ib.* 326.
 17. *Admission of facts; not amounting to waiver of trial by jury.*—An admission of the facts, upon which a motion to dismiss the suit is founded, is not a waiver of a trial by jury, nor equivalent to an agreement to substitute the court for the jury as a trier of the facts. *Moore v. Helms*, 359.
 18. *Testimony of deceased witness.*—The testimony of a witness since deceased, given on the trial of a former suit, is admissible as evidence in a subsequent suit between the same parties, or their privies, respecting the title to the same property. *Goodlett v. Kelly*, 213.
 19. *Declarations of agent; when admissible against principal.*—The admissions or declarations of an agent, relating to the business of the agency, and made while negotiating in reference to it, are admissible as evidence against his principal. *Belmont Coal & Railroad Co. v. Smith*, 206.
 20. *Declarations; when admissible as part of res gestæ.*—Declarations made by parties contemporaneously with a contract, and shedding light thereon, are admissible evidence as a part of the *res gestæ*; as also are declarations made by a person who is in possession of property, explanatory of his possession, or in disparagement of his title; but his declarations as to the source from which his title was derived, or merely narrative of past transactions, do not fall within this principle. *Vincent v. The State*, 274.
 21. *Declarations against interest, by deceased person.*—As a general rule, the declarations of a third person are regarded as mere hearsay, and are not competent evidence; yet, they become competent, as the best evidence of which the nature of the case will admit, when it is shown that they were against the interest of the declarant when made, that he had competent knowledge of the facts stated,

EVIDENCE—*Continued.*

and that he is since deceased. *Humes v. O'Bryan & Washington*, 64.

22. *Same*.—This principle applies, where the defendant is sued as a partner with a person since deceased, on an account contracted with plaintiffs, and renders admissible, as evidence for the defendant, the declaration of the deceased that they were not partners at the time the account was contracted, on proof the insolvency of the alleged partnership as such when the declaration was made. *Ib.* 64.
23. *Declarations explanatory of possession*.—The declarations of a person who is in possession of property, made in good faith, explanatory of his possession, and showing the character or extent of his claim to the property—whether in his own exclusive right, or as tenant of another; or the capacity in which he holds, as partner, trustee, or agent of another—are competent evidence as a part of the *res geste*, whenever the fact of possession itself is pertinent to the issue, no matter who may be the parties to the litigation. *Ib.* 64.
24. *Same; proof of partnership*.—On this principle, the defendant in this case being sued as partner in a mercantile business with a person since deceased, by whom the business was conducted: *held*, that the acts and declarations of the deceased, while in possession of the goods, and carrying on the business, so far as they were explanatory of his possession, as indicating whether the goods were his own, or were claimed by him as joint partner with another person, were competent and admissible as evidence, as part of the *res geste*; but were not admissible as evidence, as against the defendant, of the existence of the alleged partnership, unless some notice or knowledge of them was brought home to him; though they were relevant to corroborate or rebut, as the case may be, other evidence offered to prove the existence or non-existence of such partnership. *Ib.* 64.
25. *General reputation; what may be proved by*.—The existence or non-existence of a partnership can not be proved by general reputation: nor can the character of a person's possession of a stock of goods be proved by any general understanding in the neighborhood in which he carries on his business. *Ib.* 64.
26. *Same*.—The existence of a partnership having been once shown by independent testimony, proof of a general reputation, or common report of its existence, in the neighborhood in which the business is carried on, is competent to show a probable knowledge of the fact by the plaintiff, on the principle that a person would be likely to know any fact generally known in his neighborhood; and for the like reason, the notoriety of a dissolution, or, perhaps, of the non-existence of a partnership, may be shown, to charge a party with implied notice of the fact; but this principle can not be so extended, as to charge a party residing in a distant city with implied knowledge or notice of a fact, because it is generally known in a remote local neighborhood, without proof of other facts tending to show that he had opportunities of hearing the common report. *Ib.* 64.
27. *Declarations of partner; admissibility as against another*.—The declarations of one person, as to the existence of a partnership between himself and another person, are not admissible evidence against the latter, to prove the fact of partnership, unless they were made in his presence, or fall within some recognized exception to the general rule excluding hearsay evidence. *Ib.* 64.
28. *Same*.—The declarations of one partner, while in possession and carrying on the business, strictly explanatory of his possession, whether against interest or not, are admissible as evidence against

EVIDENCE.—*Continued.*

the person sought to be charged as his co-partner, in corroboration of other and independent evidence of the alleged partnership; but his declarations as to where he bought the goods, or a portion of them, or on whose account, being merely narrative of a past transaction, do not come within this principle; and his declaration of his inability to induce the defendant to become his surety for a sum of money, which he wished to borrow, is not admissible. *Ib.* 64.

29. *Declarations of third person; admissibility as evidence.*—The declarations of the defendant's brother, made to the prosecutor a few days before the commission of the alleged trespass, but not in the defendant's presence, nor shown to have been authorized by him, are *res inter alios actæ*, and not admissible as evidence against the defendant; and neither the relationship between the two brothers, nor the fact that they were in company when the alleged trespass was committed, is sufficient to bring such declarations within the principle which governs the admissibility of the acts and declarations of conspirators as evidence against each other. *Owens v. The State*, 401.
30. *Declarations and conduct of conspirators.*—In charges of crime which, in their nature, may be perpetrated by more than one guilty participant, if there be a previously formed purpose to commit the offense, the acts, declarations and conduct of each conspirator, in promotion of the object or purpose of such conspiracy, or in relation to it, become the acts, declarations and conduct of the others, and are competent evidence against them; but the sufficiency of such evidence must be determined by the jury, and, before it can be admitted to go to them, a foundation should be laid, by proof addressed to the court, *prima facie* sufficient to establish the existence of such conspiracy. *McAnally v. The State*, 9.
31. *Dying declarations; admissibility of.*—Dying declarations should always be received as evidence with the greatest care and caution, and the court should rigorously scrutinize the primary facts upon which their admissibility as evidence depends; but, when these primary facts are clearly and satisfactorily shown—that the deceased was at the time *in extremis*, and that he was under a sense of impending death—the evidence must be received, leaving the jury to decide upon its weight and credibility. *Kilgore v. The State*, 1.
32. *Same.*—Dying declarations are admissible as evidence, when made under a sense of impending dissolution, although the declarant may have never expressed the conviction that he must die. *Wills v. The State*, 21.
33. *Dying declarations; charge as to.*—The deceased having been killed by the defendant while engaged in a hand-to-hand combat, one having a pistol, and the other a knife in his hand; the subsequent declaration of the deceased, "*I would have gotten him, if he had not been too quick for me*," can not be regarded as the mere expression of an opinion by him, but rather characterizes, as matter of fact, both the *animus* and the avidity with which he engaged in the affray; and having been admitted by the court below as dying declarations, a charge requested, instructing the jury that they "are authorized to consider the dying declaration of the deceased, in forming their conclusions as to what might have influenced the defendant's mind, as to the necessity of his striking or shooting for the preservation of his life, or to save himself from great bodily harm," is improperly refused. (BRICKELL, C. J., dissenting.) *Brown v. The State*, 478.
34. *Statement by defendant.*—The "statement as to the facts," which the accused is permitted to make in his own behalf (*Sess. Acts*

EVIDENCE—*Continued.*

1882-83, pp. 3-4), though not under oath, is in the nature of evidence, and should not be capriciously rejected by the jury, "though they may discard it as unworthy of belief, especially when it is in irreconcilable conflict with the testimony of disinterested witnesses under oath;" but the court has no power to disregard it, and is bound to consider its evidential tendencies in subsequent rulings on evidence. *Williams v. The State*, 18.

BURDEN, WEIGHT, AND SUFFICIENCY.

35. *Burden of proof as to notice.*—As against the holders of negotiable municipal bonds, an averment of notice of irregularities in their issue which would invalidate them, though necessary in a bill which seeks to enjoin their collection, is negative in its character, and does not impose on the complainants the *onus* of proving notice. *The State v. City Council of Montgomery*, 226.
36. *Same, as to limitation of partner's authority.*—Any private agreement between partners, or limitation placed on the authority of the partner by whom the business is conducted, is of no avail against a creditor who has contracted in ignorance of it; and the *onus* of showing notice or knowledge of such agreement or limitation is on the partner who disputes his liability on an account contracted within the scope of the partnership. *Humes v. O'Bryan & Washington*, 64.
37. *Same, as to consideration of conveyance assailed for fraud.*—When an existing creditor attacks as fraudulent a conveyance executed by his debtor, and assails the consideration as simulated and fictitious, the *onus* is on the grantee to prove an adequate valuable consideration to support the conveyance, and its recitals are not evidence in his favor as against the complainant. *Zwicker v. Brigham & Co.*, 598; also, *Vincent v. The State*, 274.
38. *Same; consideration and recitals of mortgage.*—When the instrument, a specific execution of which is sought, is in the form of a mortgage to secure the payment of a debt particularly described, its recitals are *prima facie* evidence of the existence of the debt, and cast on the mortgagor the *onus* of disproving them. *Roney v. Moss*, 390.
39. *Burden of proof as to negligence.*—In an action against a railroad company, to recover damages for injuries to stock, when the fact of injury by the defendant or its servants has been shown, a *prima facie* case is made out for the plaintiff, and the *onus* is then cast on the defendant "to acquit itself of negligence, or to show a compliance with the statute;" that is, if the injury occurred at one of the places specified in the statute, and under the circumstances therein detailed, a compliance with the requisitions of the statute must be shown; and if under other circumstances, the evidence must be sufficient to satisfy the jury that it occurred without such negligence as, under the general law governing the doctrine of negligence, would render the defendant liable. *Railroad Company v. Bayliss*, 150.
40. *Trespass; burden of proof as to excuse.*—"Legal cause, or lawful excuse" for the alleged trespass, is defensive matter, which the prosecution is not required to negative, but which must be affirmatively proved by the defendant, unless the testimony which proves the act also proves the excuse. *Owens v. The State*, 401.
41. *Trial of right of property; burden of proof.*—In this action, the plaintiff in the process is the actor, and the *onus* is on him to show the levy of valid process in his own favor, and to adduce *prima facie* evidence of the ownership of the property by the defendant in the

EVIDENCE—*Continued.*

- process; and until he has done this, the claimant is not required to adduce any evidence. *Jackson v. Bain*, 328.
42. *Burden and sufficiency of proof in chancery.*—The onus of proof resting on the complainant to establish his case, if the evidence adduced is doubtful, or in equipoise, he is not entitled to a decree. *Evans, Fite, Porter & Co. v. Winston*, 349.
 43. *Presumption arising from failure of proof.*—When a party has the means and opportunity to prove a material fact, and fails or neglects to prove it, it is a fair and just presumption that the fact does not exist. *Roney v. Moss*, 390.
 44. *Testimony of party's own witness.*—As a general rule, a party can not impeach the general reputation or credibility of a witness introduced by him; yet it can not be asserted, as matter of law, that the testimony of a witness must always be taken most strongly against the party by whom he was introduced. *Coleman v. Siler*, 435.
 45. *Charge as to sufficiency of.*—In a criminal case, a charge requested in these words, "A probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal," asserts a correct proposition, and its refusal is an error which will work a reversal of the judgment. (*Cohen v. The State*, 50 Ala. 108, is irreconcilable with *Williams v. The State*, 52 Ala. 411, but it asserts the correct rule.) *Bain v. The State*, 38.
 46. *Weight and effect of testimony when "unreasonable and improbable."* Whether the testimony of a witness "is unreasonable and improbable," is a question for the jury; and even if the testimony is "unreasonable and improbable," it does not follow, as matter of law, that the jury must disbelieve it. *Ross v. The State*, 532.
 47. *Corroborative evidence; when necessary.*—Corroborative evidence, as necessary to authorize a conviction on the testimony of a single witness, is only required when that witness is an accomplice (Code, § 4895); and when the jury is left in doubt as to whether the witness was in fact an accomplice, while such doubt may be considered by them in weighing his testimony, the case is not within the statute. *Ib.* 532.
 48. *Flight, and proximity to scene of crime, as evidence corroborating accomplice.*—The fact of flight, by a person accused or suspected of crime, has of itself some probative force as a criminating circumstance; and when it appears that the crime was committed at a very unseasonable hour in the middle of the night, proximity to the scene, and opportunity for committing it, are circumstances "tending to connect the accused with its commission" (Code, § 4895), as those words are used in the statute forbidding a conviction of felony on the uncorroborated testimony of an accomplice. *Ib.* 532.
 49. *Perjury; sufficiency of evidence.*—To authorize a conviction for perjury, there must be two witnesses, or one witness with strong corroboration; and when the perjury charged consists of alleged false testimony given under oath as a witness on a trial for perjury, while it is competent for the prosecution to prove contradictory statements, as to the same facts, made by the defendant when examined as a witness before the grand jury, a conviction can not be had on proof of these former statements, unless their truth is substantiated by other evidence. *Peterson v. The State*, 34.

MATTERS JUDICIALLY KNOWN.

50. *Annuity Tables.*—In calculating the value of the wife's inchoate or contingent right of dower in her husband's lands, which can only

EVIDENCE—*Continued.*

be done with any accuracy by a computation based on what are commonly called "Annuity Tables," the "American Table of Mortality" being now regarded as the orthodox standard throughout the United States, judicial notice thereof may be taken by the chancellor, or by the register on a reference. *Gordon, Rankin & Co. v. Tweedy*, 232.

51. *Contested election*.—The contested election between Gen. J. Wheeler and Col. W. M. Lowe, as member of Congress from the 8th district of Alabama, at the general election held in November, 1880, "is public, official history, of which the court takes judicial notice." *Lewis v. Bruton*, 317.
52. *Capacity of railroad car*.—The courts can not take judicial knowledge of the rule for the measurement of corn in the shuck, nor declare that a railroad car twenty-six feet long, eight feet wide, and four feet high, can not hold three hundred bushels of corn in the shuck. *S. & N. Ala. Railroad Co. v. Wood*, 449.
53. *Planting and growth of crops*.—The court takes judicial notice of facts which are matters of common knowledge.—"so common that all persons must be presumed to be cognizant of them;" as, that a crop of cotton has been planted, and was growing but immature on the 13th May, and that it was still immature on the 20th June. *Loeb & Weil v. Richardson*, 311.

OBJECTIONS.

54. *Objection to question and answer*.—When a question calls for irrelevant or illegal evidence, and the answer to it is illegal or irrelevant, an objection to the question is sufficient to exclude the answer; but, where the answer is not strictly responsive to the question, though apparently suggested by it, the objection to the question does not cover the independent matter thus elicited. *Railroad Co. v. Bayliss*, 150.
55. *Evidence admissible for one purpose only*.—When evidence is admitted which is competent for one purpose, if the party against whom it is admitted fears injury from its consideration for any other purpose, he should ask a charge limiting its operation. *Wills v. The State*, 21.
56. *Error without injury in admission of evidence*.—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy or admissibility was established by evidence subsequently introduced. *Belmont Coal & Railroad Co. v. Smith*, 206.
57. *Waiver of objection to incompetency*.—When the plaintiff is an incompetent witness for himself, under the statute (Code, § 3058), the parties in adverse interest, in such case, may waive all objection to the competency of the plaintiff's testimony; but the objection is not waived by merely filing cross-interrogatories, after first objecting to his competency. *Goodlett v. Kelly*, 213.
58. *Presumption in favor of judgment*.—When an exception is reserved to the exclusion of evidence, which is not set out, and the relevancy and materiality of which are not shown, this court will presume that it was properly rejected. *Perry v. Danner & Co.*, 485.

PAROL AND WRITTEN.

59. *Parol agreement varying writing*.—The terms of a written agreement can not be varied by proof of a contemporaneous verbal agreement, though a subsequent verbal agreement might be proved. *Coleman v. Siler*, 435.
60. *Merger of parol stipulations in writing*.—When a contract is reduced to writing, executed by one party and accepted by the other, the

EVIDENCE—*Continued.*

- writing becomes, in the absence of fraud or mistake, the sole memorial and expositor of the terms of the contract, and all prior verbal stipulations are merged in it. *Pettus v. McKinney*, 108.
61. *Same.*—When a contract is reduced to writing, the written memorial becomes the sole expositor of its terms, and all antecedent negotiations and agreements are merged in it; and oral evidence of such antecedent negotiations and agreements can not, in the absence of fraud or mistake, be received to contradict the recitals of the writing. *Mobile Life Ins. Co. v. Pruett*, 487.
 62. *Same; as to terms of policy of insurance.*—This rule applies to a policy of life-insurance, and forbids the admission of oral evidence to contradict or vary the terms of the policy, as to the time or place at which the annual premiums are payable, the consequences of non-payment on the day specified, and other material stipulations therein expressed. *Ib.* 487.
 63. *Parol evidence explaining receipt.*—A receipt given on the payment of money, whatever may be its terms, is open to explanation or contradiction by parol evidence; and any misdescription, or defective description of the debt, on which the payment was made, may be corrected or supplied by parol evidence. *Cowan & Co. v. Sapp*, 44.
 64. *Parol evidence varying indorsement.*—An indorsement of a promissory note is a contract of defined legal operation and effect, and can not be varied by proof of a contemporaneous verbal agreement between the parties, not incorporated in it. *Preston & Co. v. Ellington*, 133.
 65. *Parol evidence as to warranty or fraud.*—In actions *ex contractu*, brought for an alleged breach of contract of warranty, oral proof of a warranty is not admissible; but, where the action is *ex delicto*, based on the tort or deception practiced by the false warranty, the rule is otherwise, and parol evidence is admissible to show that the contract was induced by an oral warranty, which was known by the party making it to be false, and which was made for the purpose of deceiving the other party. *Tabor v. Peters*, 90.
 66. *Parol evidence as to consideration of writing.*—A landlord having procured a merchant to make statutory advances to one of his tenants, from whom a crop-lien note was taken by the merchant, and having executed to the merchant a writing in these words, "I hereby agree and obligate [myself] to bear half the loss, provided the crop does not pay said F. [merchant] five hundred dollars, for furnishing J. and his hands during the year 1879;" parol evidence is admissible, to show that the consideration of the writing was the agreement and promise of F. to furnish supplies to said J. to the amount of five hundred dollars. *Foster v. Napier*, 393.
 67. *Parol evidence identifying premises sold.*—When the premises conveyed are described in the deed as "Lot No. 2, of Square No. 8, in the town of R., being twenty feet in front, and running back one hundred and ten feet," and it is shown that the lot is in fact thirty feet front, parol evidence is admissible to show that the part sold and intended to be conveyed, and of which possession was delivered to the grantee, was the twenty feet front on the east side of the lot. *Sikes v. Shows*, 382.

PRIMARY AND SECONDARY.

68. *Proof of transfer of certificates of railroad stock.*—The holder of certificates of railroad stock may rely on his possession, as *prima facie* evidence of his ownership; and if he undertakes to prove title by written transfer, the books of the company are the best evidence of it; but, on proof of the fact that the books are in another State,

EVIDENCE—*Continued.*

beyond the jurisdiction of the court, secondary evidence of the transfer is admissible. *Gordon, Rankin & Co. v. Tweedy*, 232.

VARIANCE.

69. *Assignment of lease.*—In an action for rent reserved by a written lease, a sole plaintiff suing as the assignee, a recovery can not be had on proof of an assignment to a partnership of which he is a member. *McMillan v. Otis*, 560.
70. *Action on bond.*—In an action on an injunction bond, brought by T. as sole plaintiff, the complaint averring that the condition of the bond was that the obligors "would pay plaintiff all such damages as he may sustain by the suing out of said injunction," and that they have failed "to pay him the damages he has sustained;" a bond payable to B. and T. jointly, and conditioned to pay them the damages they might sustain, is not admissible as evidence, the variance being material and fatal. *Washington v. Timberlake*, 259.
71. *Action on the case; landlord's lien for rent or advances.*—Under a complaint claiming damages for the defendant's sale and conversion of a crop raised on rented lands, with knowledge of plaintiff's statutory lien as landlord for rent, whereby the lien was destroyed and lost, a recovery can not be had on proof of a statutory lien for advances. *Coleman v. Siler*, 435.
72. *Action against common carrier for loss of goods.*—In an action against a railroad company as a common carrier, for the loss of goods, the complaint being in the form prescribed by the Code (Form No. 13, p. 703), a recovery can not be had on proof of a loss which occurred after the defendant's duty and liability as a carrier had terminated, and while the goods had been left in its custody as a warehouse-man. *Kennedy Brothers v. M. & G. Railroad Co.*, 430.
73. *Bribery; admissibility as evidence, of writing containing offer.*—The offer to the juror having been made in writing, which was proved to have been delivered by his request to the juror, and to which his named was signed, but not spelled as in the indictment,—as *Carothers*, instead of *Caruthers*; the writing is properly allowed to go to the jury, notwithstanding the discrepancy, and although it was not addressed to the juror by name, and did not offer to work for him. *Ib.* 406.
74. *Indorsements on indictment; variance in spelling foreman's name.* When the record affirmatively shows that the indictment was returned into court, indorsed and filed, as required by the statute (Code, § 4821), a variance in the spelling of the foreman's name, as copied in the indorsements, is immaterial, when the names are strictly *idem sonans*. *Jackson v. The State*, 26.
75. *Misnomer, and variance.*—The names *Booth* and *Boothe* are strictly *idem sonans*. *Ib.* 26.

EXECUTION.

1. *Sale of lands under execution, after death of defendant.*—A sale of lands under execution, or other legal process, issued after the death of the defendant in the writ, is a nullity, and passes no title to the purchaser, unless, as authorized by statute (Code, § 3213), a lien was acquired and kept alive during his life, without the lapse of an entire term. *Sims v. Eslava*, 594.
2. *Claim of exemption to property levied on, and contest thereof; effect on lien of execution.*—When a claim of exemption is interposed to property on which an execution has been levied, and the claim is contested by the plaintiff, the lien of the execution, by express statutory provision (Code, § 2835), is neither destroyed nor impaired "by the pendency of such contest, nor by its termination,

EXECUTION—*Continued.*

- if found in favor of the plaintiff;" but a termination and abatement of the contest by the death of the claimant is not within the terms of the statute. *Ib.* 594.
3. *Quashing execution; what grounds are available.*—On motion to quash or supersede an execution, which follows a judgment or decree regular on its face, only facts which have occurred since the rendition of the judgment or decree are available, or antecedent facts which show fraud in it, or a want of jurisdiction apparent on the record. *Werborn v. Pinney*, 591.
 4. *Same; conclusiveness of probate decree.*—A decree being rendered against an executor, on final settlement of his accounts, and affirmed by this court on appeal, an execution issued on such decree can not be quashed or superseded, on the ground that the court had no jurisdiction of the settlement, because the will, of record in that court by probate, involved trusts which were cognizable exclusively in a court of equity. *Ib.* 591.
 5. *Setting aside sale under execution; remedy at law, and in equity.* When a sale of lands under execution at law is impeached, because of mere error in the process, or on account of some error attending its execution, the court from which the process issued has exclusive jurisdiction to set aside the sale; but, if fraud or illegality attends the sale, or it has been followed by the execution of a conveyance casting a cloud upon the title, a court of equity has jurisdiction concurrent with the court of law to set it aside. *Cowan & Co. v. Sapp*, 44.
 6. *Same, on ground that judgment was in fact satisfied.*—If the judgment was in fact satisfied at the time of the sale under execution, the court from which the process issued has undoubted jurisdiction to set aside the sale; but, if the process is regular on its face, and the sale is followed by a regular conveyance to the plaintiff in execution as the purchaser, the fact of payment resting in parol, a court of equity will intervene, at the instance of the defendant in possession, set aside the sale, and cancel the conveyance as a cloud on the title. *Ib.* 44.
 7. *Same; diligence required of plaintiff.*—A party who seeks to set aside a sale under legal process, whether by motion in the court from which the process issued, or by bill in equity, must act promptly, or must satisfactorily explain any unreasonable delay; but no time can be definitely fixed, within which the application must be made, since the proceeding is of an equitable nature, dependent upon equitable principles, and necessarily governed by the varying facts of each particular case. (Doubting the correctness of the general rule declared in *Abercrombie v. Conner*, 10 Ala. 296.) *Ib.* 44.
 8. *Same.*—In this case, more than three years after the sale having elapsed before the bill was filed to set it aside, the delay was held sufficiently explained by proof of the facts, that the payment of the judgment was made to the plaintiff in Nashville, Tennessee, on the same day the land was here sold under execution, and that he made no effort to recover possession, as purchaser at the sale, until about six months before the bill was filed. *Ib.* 44.

EXECUTORS AND ADMINISTRATORS.

1. *Validity of limited grant of administration.*—A grant of letters of administration, which recites that A. B. "is hereby appointed the legal administrator of the said C. E., deceased, for the special purpose of conducting a suit at law instituted by the said C. E.," particularly describing it, is not void on its face; and it is not necessary that the record should affirmatively show that there was then a vacancy in the administration. *Wolfe v. Eberlein*, 99.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. *Validity of grant, and expiration of office, on collateral attack.*—The granting of the order of sale, on the petition of a person claiming to be the administrator, involves a judicial determination of the fact that he is such administrator; and the heirs can not impeach the sale, on such collateral proceeding, on the ground that his appointment was invalid, or that his office had expired. *May v. Marks*, 249.
3. *Administrator's statutory authority to complete and gather crop.*—An administrator has statutory authority "to complete and gather" a crop planted and commenced by the decedent while in life (Code, §§ 2439–40), which necessarily includes the incidental power to procure and furnish means necessary to that end; and the crop thus made becomes assets of the estate, "the expenses of the plantation being deducted therefrom." *Loeb & Weil v. Richardson*, 311.
4. *Same; expenses of crop; rent and advances; exemption to widow.* Where the intestate had executed a note and mortgage on his crop, to be grown on rented lands, with other personal property, for advances to be made to enable him to make the crop, and died while the crop was growing but immature; and one of the mortgages thereupon took out letters of administration on his estate, and completed and gathered the crop with moneys furnished by them; he has the right to reimburse himself out of the first proceeds of the crops, but not under the mortgage, for the moneys thus furnished and expended; and must then pay the rent, if any is due, and the debt for advances made to the intestate himself under the mortgage; and these debts are paramount to the widow's right of exemption in the personal assets of the estate. *Ib.* 311.
5. *Testamentary power to executors to sell lands; how exercised, at common law.*—At common law, a naked power to sell lands, or to do any other act, given by will to persons named as executors, could only be exercised by the joint act of all, and did not survive; but, if the power was coupled with an interest, it was capable of execution by the executors who qualified, or the survivor of them; and if a power of sale was given to executors as such, and not *nominatim*, it might be exercised by the qualifying or surviving executor, unless the will expressly pointed to a joint execution. If there was a devise to executors by name, with directions to sell, the descent to the heir was intercepted, the title passed to the donees, coupling an interest with the power, and the power might be exercised by the executors who qualified, or the survivor of them; but, under a devise that executors should sell lands, the descent to the heir was not intercepted, no estate passed to the executors, and the naked power of sale conferred on them could only be exercised by the joint act of all. *Robinson v. Allison*, 254.
6. *Same; under statutory provisions.*—To obviate the inconvenience found to result from these common-law rules, it is now provided by statute that, when lands are devised to several executors to sell, or a naked power of sale is given to them by will, the power may be exercised by those who qualify or are acting, the survivor or survivors of them (Code, § 2218); and in determining whether a power is naked (incapable of other than a joint execution), or may be executed by the qualified, acting or surviving executors, the intention of the testator, as collected from the whole will, must control, the power being construed with greater or less latitude with reference to that intent. *Ib.* 254.
7. *Same; in this case.*—Where the testator appointed his widow, his son and his son-in-law as executors of his will, made a specific devise and bequest to his widow and children and added a clause in these words: "My youngest child having heretofore attained the age of twenty-one years, I do not desire that my estate, or any part

EXECUTORS AND ADMINISTRATORS—*Continued.*

of it, should be kept together any longer than may be necessary for a convenient and equitable division. I authorize my executrix and executors to sell any part of my estate, directed to be divided among my wife and children, if it be found necessary to effect an equitable division; and such sales may be made at either public or private sale, and upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof; good security being required of the purchasers for all deferred payments, and if lands be sold, liens to be reserved on the lands sold, to be conveyed to the purchaser by my executrix or executors, or such of them as may be in office as such." *Held*, that the will conferred a discretionary power to sell, which could only be executed by the joint act and concurrence of the executrix and executors, and could not be exercised by the sole executor who qualified. *Ib.* 254.

8. *Testamentary trusts; jurisdiction of Probate and Chancery Courts.* The Probate Court has no jurisdiction to enforce and settle a trust created by will; but, when such trust is conferred upon the executor, and distinct executorial duties are also devolved upon him by the will, that court, while declining to take cognizance of the trust, may settle all matters which pertain only to the executorial duties and office; unless the duties of the trust are attached to the executorial office or character, and are so inseparably blended and mingled with the executorial duties that they can not be distinguished from each other; in which case, if the trustee has accepted and undertaken the duties of the trust, the Probate Court has no jurisdiction to execute the will, and the parties will be remitted to the Chancery Court. *Hinson v. Williamson*, 180.
9. *Testamentary power; by whom executed.*—A power conferred by will, implying personal confidence in the donee, can only be exercised by the person named; and if he disclaims, or refuses to execute the trust, the power will be considered as revoked and absolutely annulled. *Ib.* 180.
10. *Will authorizing executrix to keep estate together, and buy or sell property at discretion, construed as creating personal trust.*—Where the testator appointed his widow as executrix, and relieved her from giving bond; directed that his estate should be kept together "under her absolute power and control, she having full power to purchase or sell any property she may think proper, so long as she remains a widow;" that the annual profits of the estate should be invested by her in making purchases of property at her discretion, to be distributed among the children so as to equalize their distributive shares; and made provision for the immediate distribution of the estate, in the event of her death or marriage; *held*, that the will imposed upon the widow a personal trust in the matter of keeping the estate together, which was capable of execution by her alone; and she having refused to accept the trust, or qualify as executrix, the Probate Court could not confer on administrators *de bonis non* the power to execute it. *Ib.* 180.
11. *Keeping estate together under order of court.*—When an estate is kept together under an order of the Probate Court (Code, § 2602), the administrator has no authority to keep up the family establishment, and to support the family at the expense of the estate; but the reasonable expenses of the several members of the family, on a basis corresponding with their fortune and condition in life, should be charged against each separately as incurred by them, and not *in solido* against the estate. *Ib.* 180.
12. *Same; authority of administrator, and compensation for extra services.* Such authority to keep the estate together carries with it the incidental power to employ all ordinary means which are necessary

EXECUTORS AND ADMINISTRATORS—(*continued*).

and proper to effectuate the express power; hence, all expenditures reasonably necessary to cultivate the plantation, make, gather, and dispose of the crops, should be allowed, including, probably, a fair compensation to the administrator for his services in these matters. *Ib.* 180.

13. *Keeping estate together without authority; election by distributees; interest on rents.*—When an administrator keeps an estate together without an order of court, and without authority under the will, the distributees may, at their election, either take the profits, or charge him with rent for the use of the property; if they elect to take the profits, an allowance must be made to the administrator for all reasonable expenses incurred in making them; and if they elect to charge him with the rents, interest thereon must be computed against him. *Ib.* 180.
14. *Liability of administrators for acts and defaults of each other.*—When two administrators give a joint bond, and make a joint application to the court for an order to keep the estate together (one of them advancing moneys, from time to time, to carry on the business of the plantation, which was conducted under the immediate management of the other, and receiving a portion of the crops raised), and jointly account on their partial settlements with the court; they are jointly liable, as co-principals, to account for the profits of the farming business so carried on, without regard to the particular part or sum received by each; and in such case, a final settlement in the Probate Court, made by the surviving administrator, while it might operate as a discharge of the liability of the deceased as surety on the joint administration bond, would not affect his liability as co-principal on account of his participation in any *derastavit* committed by the survivor during their joint administration. *Ib.* 180.
15. *Same.*—When executors act separately, and do not become bound for each other by the execution of a joint bond, each has an equal right to receive the assets of the estate, whether money, or any other kind of chattels; and one is not responsible for a *derastavit* committed by the other, unless he has in some way contributed thereto, or has made himself liable by his gross negligence. *Knight v. Haynie*, 542.
16. *Same.*—An executor who is merely passive, by not obstructing his co-executor in receiving the assets, and who does not himself concur in the application of them, is not responsible for them; but, when one receives assets, and pays them over, voluntarily and unnecessarily, to his co-executor, by whom they are embezzled or lost, he who so paid them over is answerable with the other, unless he can show a sufficient excuse; and in the case of several executors, who by agreement divide the claims of the estate among themselves for collection, each returning a separate inventory, each is liable for the whole, because the receipts of each are pursuant to the agreement between them. *Ib.* 542.
17. *Duty and liability of executor who is also administrator of debtor's estate.*—When an executor becomes also the administrator of the estate of a deceased debtor to his testator, and receives assets sufficient to pay the debt, both estates being solvent, it is his duty at once to make the application; and he is not discharged from liability by paying it over to his co-executor, pursuant to an agreement between them for dividing the collection of the assets, particularly when the habits, health, and pecuniary circumstances of such co-executor should have awakened inquiry on his part. *Ib.* 542.
18. *Objection to credit claimed by administrator.*—When an administrator, on final settlement of his accounts, claims a credit for an account

EXECUTORS AND ADMINISTRATORS—*Continued.*

held by him against his intestate, part of which is barred by the statute of limitations, an objection to its allowance, not limited to the part which is barred, but addressed to the entire account, may be overruled entirely; and the same rule applies to an objection to the allowance of interest on the account, when part of it is a proper charge. *Robertson v. Black*, 322.

EXEMPTIONS.

1. *Against what debts allowed.*—The claim of the State against a defaulting public officer arises from both a tort and a crime, and no exemption of property can be claimed or allowed against it. *Vincent v. The State*, 274.
2. *By what law determined.*—As against the claims of creditors, the right to a homestead exemption must be determined by the law which was of force when the debt was created, or the liability incurred. *Cochran v. Miller*, 50.
3. *Who entitled to in 1859.*—Under the laws which were of force in 1859, a homestead exemption was only reserved to a debtor who was the head of a family (Rev. Code, § 2880); and an unmarried man, having no inmate of his house dependent on him, was not the head of a family, though he had hired servants or laborers in his employment. *Ib.* 50.
4. *Occupancy of homestead.*—As a general rule, subject to statutory exceptions, occupancy is essential to support a right of homestead exemption; and this occupancy must exist at the time when, but for it, the lien sought to be enforced would attach to the property. *Scaife v. Argill*, 473.
5. *Lease of homestead; whether an abandonment or not.*—Under the statute which declares that a leasing of the homestead, "for a period of not more than twelve months at any one time, shall not be deemed an abandonment of it" (Code, § 2843), a lease for a term of twelve months is authorized, or for several terms aggregating not more than twelve months; but, if the owner does not resume possession at the expiration of the twelve months, and has put it out of his power to do so by making a new lease to commence at the expiration of the first, the right of homestead exemption is forfeited and lost. *Ib.* 473.
6. *Widow's right of homestead exemption; alienation of homestead.*—The widow's right of homestead exemption, under the provisions of the constitution of 1868, is the right to remain in the occupancy of the homestead of her deceased husband during her life; and this right she may abandon, and does abandon, as against the heir, by an alienation to another person. *Barber v. Williams*, 331.
7. *Same; who may contest.*—When a widow files her petition in the Probate Court, claiming and asking the allotment of a homestead in the lands of her deceased husband, her right may be contested by the personal representative of the husband, or by any person in adverse interest (Code, § 2841); but the object and purpose of the statutory contest is to separate the homestead lands from the lands subject to administration, and the title is not involved; nor can a mortgagee propound his interest, and try the validity and priority of his mortgage as against the widow's claim of homestead, either in the Probate Court, or in the Circuit Court on certificate from the Probate Court. *Coffey v. Joseph*, 271.
8. *Contest of claim of homestead exemption; where tried.*—When objections are filed by the administrator to the widow's claim of a homestead exemption, or to the allotment thereof made by commissioners appointed by the Probate Court, that court has no power

EXEMPTIONS—*Continued.*

- to try the issue (Code, §§ 2838, 2841), but should certify it to the Circuit Court for trial. *Cochran's Adm'r v. Sorrell*, 310.
9. *Exemption of personal property, in favor of widow; priority over other claims.*—The claim of the surviving widow to an exemption of personal property in the estate of her deceased husband, as secured to her by statute (Code, §§ 2825–26), is paramount to the rights of the personal representative for the general purposes of administration, and to preferred debts of the estate; but it does not override liens created by law, or by the contract of the husband while in life. *Loeb & Weil v. Richardson*, 311.
 10. *Same; expenses of crop; rent and advances.*—Where the intestate had executed a note and mortgage on his crop, to be grown on rented lands, with other personal property, for advances to be made to enable him to make the crop, and died while the crop was growing but immature; and one of the mortgagees thereupon took out letters of administration on his estate, and completed and gathered the crop with moneys furnished by them; he has the right to reimburse himself out of the first proceeds of the crops, but not under the mortgage, for the moneys thus furnished and expended; and must then pay the rent, if any is due, and the debt for advances made to the intestate himself under the mortgage; and these debts are paramount to the widow's right of exemption in the personal assets of the estate. *Ib.* 311.
 11. *When widow, claiming exempt personal property, may come into equity.*—"The court will not say there may not be cases in which equity would interfere, at the instance of the widow, to enable her to make her selection of exempt personal property and have it made available;" but, when her bill fails to show any remissness, undue delay, or other dereliction of duty on the part of the administrator, it is without equity. *Ib.* 312.
 12. *Claim of exemption; when and how made.*—A claim of property as exempt from levy and sale under execution, or other legal process, may be asserted in either one of two ways: 1st, *before* the levy or seizure under legal process, by a declaration in writing, describing the property so claimed, verified by oath, and filed for record in the office of the probate judge (Code, § 2828); 2d, *after* the levy or seizure under legal process, by a similar claim in writing, and under oath, "which must be lodged with the officer making the levy" (*Ib.* § 2834); and if not asserted in one or the other of these two modes, the claim is waived. *Wright v. Grabfelder & Co.*, 460.
 13. *Same; after execution of forthcoming bond.*—When no declaration and claim has been filed prior to a levy, and the defendant is in possession of the property under a forthcoming bond, "it may admit of question whether a valid claim of exemption can be interposed" while the property so remains in his possession. Possibly, the proper practice would be to first surrender the property, in discharge of the bond, and then make the affidavit of claim; but this is not decided. *Ib.* 460.
 14. *Claim of exemption to property levied on, and contest thereof; effect on lien of execution.*—When a claim of exemption is interposed to property on which an execution has been levied, and the claim is contested by the plaintiff, the lien of the execution, by express statutory provision (Code, § 2835), is neither destroyed nor impaired "by the pendency of such contest, nor by its termination, if found in favor of the plaintiff;" but a termination and abatement of the contest by the death of the claimant is not within the terms of the statute. *Sims v. Eslava*, 594.
 15. *Claim of exemption by answer in chancery.*—When the original answer sets up an insufficient claim of exemption, its defects may be remedied by amendment; and an amended claim of exemption,

EXEMPTIONS—*Continued.*

allowed by the chancellor, will be treated by this court, if necessary, as an amendment of the answer. *Zelnicker v. Brigham & Co.*, 598.

FORCIBLE ENTRY, AND UNLAWFUL DETAINER.

1. *Who may maintain action.*—An action for forcible entry and detainer is purely possessory, the question of title not being involved, and can not be maintained by a person who has not had prior possession. *Weldon v. Schlosser*, 355.
2. *What is forcible entry, or unlawful refusal to surrender possession.* The degree of force, or the particular wrongful acts necessary to support the action, are defined by the statutes giving and regulating the remedy (Code, § 3696; Sess. Acts 1878-9, p. 49); and among these are, "entering peaceably, and then by unlawful refusal keeping the party out of possession;" and when there is any evidence of such refusal, the plaintiff's prior possession not being denied, the question of its sufficiency is properly submitted to the jury. *Ib.* 355.
3. *Evidence of title, or right to possession.*—The defendant having entered peaceably, not denying the fact of plaintiff's prior possession, but claiming under an entry certificate as a homestead, he can not adduce evidence of such entry and certificate, for the purpose of showing that his subsequent refusal to surrender the possession on demand was not unlawful. *Ib.* 355.
4. *Injunction of judgment in unlawful detainer, but not writ of restitution.*—The unsuccessful defendant in an action of unlawful detainer, having taken an appeal to the Circuit Court, and then filed a bill in equity to correct an alleged mistake in his lease, may restrain the further prosecution of the action at law until the determination of the suit in equity; but, not having given a *supersedeas* bond (Code, § 3711), the issue of a writ of restitution on the judgment will not be enjoined in the meantime. *Robbins v. Battle House Company*, 499.

FORGERY. See CRIMINAL LAW, 27-29.

FRAUD.

1. *When misrepresentations constitute fraud.*—A misrepresentation of a material fact by the vendor of a chattel, made at the time of the sale, or pending the negotiations, on which the purchaser has the right to rely, and on which he does in fact rely, is a fraud, and furnishes a cause of action to the purchaser, or a ground of defense to an action for the purchase-money. *Tabor v. Peters*, 90.
2. *Fraud, as exception to statute of limitations.*—An infant remainderman under a deed, residing from infancy with the trustee as a member of his family, and being kept in ignorance of the trust and her rights under it, until the discovery and surrender of the deed on the death of the trustee, is allowed twelve months after such discovery within which to file a bill for an account of rents and profits received (Code, § 3242), if the statute of limitations be applicable to the case; and she is not chargeable with constructive notice of the deed, under such circumstances, because it had been duly recorded many years before. *McCarthy v. McCarthy*, 546.
3. As to equitable relief against fraud, see CHANCERY, 1, 2, 5-8.

FRAUDS, STATUTE OF.

1. *Promise to answer for debt or default of another.*—A landlord having procured a merchant to make statutory advances to one of his tenants, from whom a crop-lien note was taken by the merchant, and having executed to the merchant a writing in these words, "I hereby agree and obligate [myself] to bear half the loss, provided the crop does not pay said F. [merchant] five hundred dollars, for furnishing J. and his hands during the year 1879;" such writing is void (Code, § 2121), being a promise to answer for the debt or default of another, and not expressing on its face the consideration on which it was founded. *Foster v. Napier*, 393.

FRAUDULENT CONVEYANCES.

1. *Voluntary conveyance; validity as against creditors, and burden of proof as to consideration.*—A person who is indebted, or on whom rests a legal liability, can not make a gift, or voluntary conveyance of property, which will be upheld against such pre-existing debt or liability; and when the creditor seeks to reach and condemn the property so conveyed, the *onus* is on the grantee to show that the conveyance is supported by a sufficient valuable consideration. *Vincent v. The State*, 274.
2. *Deed constructively fraudulent, but standing as security for indemnity of grantee; liability for rents, and allowance for improvements and taxes.*—A conveyance being held constructively fraudulent at the suit of creditors, but allowed to stand as a valid security for the reimbursement or indemnity of the grantee, to the extent of the consideration actually paid; on the statement of the account, he is chargeable with rents during his possession, and is entitled to a credit for the value of permanent improvements erected by him before (but not after) the filing of the bill, and for all taxes paid, whether before or after the bill was filed. *Gordon, Rankin & Co. v. Tweedy*, 232.
3. *Burden of proof as to consideration of conveyance assailed for fraud.* When an existing creditor attacks as fraudulent a conveyance executed by his debtor, and assails the consideration as simulated and fictitious, the *onus* is on the grantee to prove an adequate valuable consideration to support the conveyance, and its recitals are not evidence in his favor as against the complainant. *Zelnicker v. Brigham & Co.*, 598.
4. *When creditor without lien may come into equity, to set aside sale or conveyance on ground of fraud.*—The statute authorizing a creditor without a lien to file a bill in equity "to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor" (Code, § 3886), is not confined to cases in which a discovery is sought; nor is it necessary that the bill shall ask a discovery, or conform to the requisites of a bill for discovery. *Ib.* 598.
5. *Fraudulent sale of goods; general assignment.*—A sale of his entire stock of goods by an embarrassed or insolvent debtor to one of his creditors, in satisfaction of a debt admitted to be valid, is not fraudulent as against other creditors, when there is no secret trust or reservation of a benefit to the debtor; nor can such a conveyance be declared and enforced as a general assignment at the instance of the other creditors. *Heyer Brothers v. Bromberg Brothers*, 524.
6. *Assignment by insolvent debtor, giving preference to individual over partnership creditors.*—An insolvent debtor, in making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts. *Evans, Fite, Porter & Co. v. Winston*, 349.

GAMING CONTRACTS.

1. *Action for money paid on wager ; statutory provisions.*—The statute declaring all gambling contracts void, and giving an action to recover back money paid on them (Code, § 2131), applies only to actions between the parties to such contracts, and does not affect actions against stakeholders. *Lewis v. Bruton*, 317.
2. *Action against stakeholder, for money deposited on wager ; lies when.* When money is deposited with a stakeholder, on a wager, either party may withdraw from the illegal transaction, and demand the return of his money, at any time before it has been paid over to the winner after the result is ascertained ; and the loser may maintain an action against the stakeholder, if the latter pays the money to the winner after notice by the loser not to pay it. *Ib.* 317.
3. *Same.*—The wager being on the result of a congressional election in a particular district, a payment by the stakeholder to the supposed winner after the result of the election is “generally known,” or “publicly announced,” but before the issue of an official certificate by the proper officer, is premature, and is no defense to a subsequent action by the loser, who, before the issue of the certificate, notified the stakeholder not to pay ; but, *it seems*, the stakeholder may safely pay over the money after the official announcement of the result, without waiting for the decision of an uncertain contest. *Ib.* 317.
4. *Sufficiency of complaint.*—In an action against a stakeholder, to recover money deposited on a wager, and by him paid over to the supposed winner, it is not necessary that the complaint should, by its averments, negative the fact that the money was so paid before notice not to pay, that being defensive matter merely. *Ib.* 317.

GARNISHMENT. See ATTACHMENT, 5, 6.

GRAND JURY. See CRIMINAL LAW, 48, 49.

HOMESTEAD. See EXEMPTIONS.

HOMICIDE. See CRIMINAL LAW, 32-41.

HUSBAND AND WIFE.

1. *Wife's statutory estate ; increase of domestic animals.*—The increase or offspring of domestic animals, belonging to the wife's statutory estate, also form a part of the *corpus*, and belong to her. *Walker v. Ivey*, 475.
2. *Wife's earnings.*—The earnings of the wife belong to the husband, but he may repudiate his right to them, and allow the wife to retain them as her own ; and when he does so, not being in debt, his subsequent creditors can not reach and subject them to the satisfaction of their debts. *Wing v. Roswald*, 346.
3. *Same, commingled with funds belonging to statutory estate ; not reached by garnishment against borrower.*—When a promissory note is taken for money loaned, whether payable to the wife directly, or to the husband as her agent, a creditor of the husband can not reach and subject any part of the debt, by garnishment against the maker of the note, because a part of the money arose from the separate earnings of the wife, and were mingled with other moneys belonging to her statutory estate. *Flournoy & Epping v. Owens*, 446.
4. *Rents and profits of wife's statutory estate.*—If the husband receives the rents and profits of lands belonging to his wife's statutory estate, and uses or converts them to his own use, he is under no obligation to account to the wife for them, and a re-payment to her

HUSBAND AND WIFE—*Continued.*

would be fraudulent and void as against his existing creditors; but he may refuse to receive such rents and profits, and may allow the wife to invest them in property in her own name; whereby they would become a part of the *corpus* of her statutory estate, and the property could not be subjected to the husband's debts. *Wing v. Roswald*, 346.

5. *Renunciation by husband of right to income and profits of wife's property.*—The court will not affirm that the husband may not renounce, in favor of the wife, his statutory right to control and dispose of the income and profits of the wife's statutory property, or invest them primarily for her benefit; but such renunciation, to prevail against the claims of his creditors, must be made before the income accrued, or before it was used or invested. *Vincent v. The State*, 274.
6. *Conversion of wife's property by husband.*—If the husband converts the *corpus* of his wife's statutory estate, either by investing it in property in his own name, or by otherwise using it for his own purposes, he thereby becomes indebted to her, and may convey to her, in payment of such indebtedness, either the property so purchased, or other property of value not materially disproportionate; but this principle does not extend to the income and profits of the funds or property so used and converted, as to which he is under no obligation to account to the wife, her heirs, or legal representatives (Code, § 2706), and which will not support a subsequent conveyance to the wife as against his prior creditors. *Id.*, 274.
7. *Equitable estate of married woman; priority of liens among creditors.* In charging the equitable estate of a married woman with her contracts and engagements, a court of equity does not proceed on the theory that they are valid and operative as appointments or appropriations by her of so much of her estate as may be necessary to satisfy them, but on the principle of her presumed intention to do a valid act, and therefore to charge the estate which she has full capacity to charge; but her contracts do not create a lien or charge on any specific property, such as is created by the filing of a bill in equity; and when bills are filed by several creditors, seeking to charge and condemn the same property, the priority of their liens is determined by the time when their respective bills were filed, and not by the time when their debts were created. *Masson v. Turner*, 513.
8. *Rents and profits of wife's equitable estate.*—As to her equitable separate estate, a married woman is regarded as a *femme sole*, and has the same power and dominion over the rents and profits as over the *corpus*; although her husband is her trustee, when no other trustee is appointed by the instrument creating the estate, and must sue at law for the recovery of the property. *Crockett v. Lide*, 301.
9. *Same; presumption of gift to husband.*—The wife may make a gift to her husband of property belonging to her equitable estate, whether it be part of the *corpus*, or of the rents and income; and when she permits him to collect and receive the rents, and use or convert them to his own use during the coverture, a gift of them to him will be presumed after the lapse of a reasonable time, in the absence of proof of an express dissent on her part; but, where a note is taken by the husband, for the rent of lands belonging to the wife's equitable estate, payable to himself, and is transferred by him before maturity, the wife may assert her right to the rent, as against the assignee of the note, on the death of the husband before its payment or maturity; and a payment to her will protect the maker against an action by the assignee, when it is not shown

HUSBAND AND WIFE—*Continued.*

that she had, during the life of the husband, notice or knowledge of the assignment. *Ib.* 301.

10. *Removal of disabilities of coverture, by decree of chancellor; sufficiency of petition.*—To authorize and sustain a decree by the chancellor, in the exercise of his statutory jurisdiction (Code, § 2731), relieving a married woman of the disabilities of coverture as to her statutory or other separate estate, "so far as to invest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *femme sole*," her petition (or application) must aver that she has a separate estate, statutory or equitable; and the want of such an averment, it being a jurisdictional fact, renders the decree void. *Doe, ex dem. Stoutz v. Burke*, 530.

INDICTMENT. See CRIMINAL LAW, 42-47.

INFANTS. See CHANCERY, 66, 67.

INSURANCE.

1. *Policy of life-insurance; conditions as to payment of premiums.*—A policy of life-insurance, in the usual form, is not an assurance for a single year, with a privilege of renewal from year to year, by paying the annual premiums, but is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums; and while the payment of the annual premiums, on the day specified, is not a condition precedent, the time of payment is of the essence of the contract, and non-payment *ad diem* involves absolute forfeiture. *Mobile Life Ins. Co. v. Pruett*, 487.
2. *Parol evidence as to terms of policy.*—The general rule of law applies to a policy of life-insurance, and forbids the admission of oral evidence to contradict or vary the terms of the policy, as to the time or place at which the annual premiums are payable, the consequences of non-payment on the day specified, and other material stipulations therein expressed. *Ib.* 487.
3. *Modification of policy by subsequent dealings; waiver of forfeiture.* In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the non-payment of annual premiums on the day specified, the test is, whether the insurer, by his course of dealing with the assured, or by the acts and declarations of his authorized agents, has induced in the mind of the assured an honest belief that the terms and conditions of the policy, declaring a forfeiture in the event of non-payment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been thus induced, and the insured has acted on it, the insurer will not be allowed to insist on the forfeiture. *Ib.* 487.
4. *Same; taking note for premium, and extending day of payment.*—When a promissory note is accepted for the first premium, and the day of payment is afterwards extended by special agreement, these facts, without more, do not justify the inference by the assured that similar indulgence will be granted as to other premiums when they fall due. *Ib.* 487.
5. *Acceptance of premium after forfeiture.*—The acceptance of a premium by the insurer or his authorized agent, after a forfeiture has been incurred by non-payment on the day specified, if made with knowledge of the facts, is a waiver of the forfeiture; but this effect

INSURANCE—*Continued.*

can not be attributed to the acceptance of a premium by an agent of the insurer, after the death of the person assured, when it is shown that the fact of such death was known to the person who made the payment, but was not known or communicated to the agent. *Ib.* 487.

6. *Forfeiture of policy on non-payment of premiums or interest; indorsement as to paid-up value.*—An indorsement on a policy of life-insurance which states that, "in consideration of the payment on the within policy of four annual premiums, less note for \$169.20, given for balance due on premium loans to November 11th, 1872, said policy is entitled at maturity to a paid-up value of four-tenths of the sum insured, subject to deduction of note above described, interest upon which is payable annually in advance," does not show the entire contract between the parties, but is to be construed in connection with the stipulations contained in the policy itself; and one of these stipulations being that, "in case the assured shall not pay the said premiums at or before the date mentioned for the payment thereof, and the interest annually on all notes or credits on account of premiums, until the same are fully paid up, then this policy shall be void," while another stipulation was that, "when this policy shall cease or become void, all payments made thereon shall be forfeited to said company,"—neither the note nor the interest thereon being paid, the policy is forfeited. *Ala. Gold Life Ins. Co. v. Thomas*, 578.

INTEREST. See EXECUTORS AND ADMINISTRATORS, 13; USURY.

JUDGMENTS AND DECREES.

1. *Entry of judgment or decree on verdict; when properly dated.*—When the probate of a will is contested, and an issue of *decisavit vel non* is submitted to a jury, who find in favor of the will, the judgment of the court necessarily follows the verdict, as in an action at law; and the verdict being rendered on Saturday morning, while the court is in session, the judgment is properly entered and dated as of that day, although the entry was not actually made until ten o'clock at night, after the expiration of office hours. *Lancier v. Russell*, 364.
2. *Amendment of judgment against garnishee, nunc pro tunc, by reciting judgment against defendant.*—Re-affirming the decision made in this case at the last term, the court holds that, in the entry of a final judgment against a garnishee, it is the duty of the clerk to make it recite the fact and amount of the original judgment against the debtor; and that his failure to do so is a clerical error, which may be corrected by amendment, *nunc pro tunc*, at a subsequent term. *M. & C. Railroad Co. v. Whorley*, 264.
3. *Action on judgment, and assignment thereof.*—A judgment is not a "contract, express or implied, for the payment of money," within the meaning of the statute which requires an action on such contract to be brought in the name of the party really interested (Code, § 2893; and an action on it is properly brought, notwithstanding its assignment, in the name of the original plaintiff, and revived in the name of his personal representative. *Wolffe v. Eberlein*, 99.
4. *Estoppel against assailing judgment by confession.*—When a judgment by confession in a criminal case is improperly entered against a surety, on a power of attorney substantially defective, and an execution issued thereon is levied on his property, if he then obtains a postponement of the sale, by promising to pay a part of the judgment within thirty days, and the residue by another day,

JUDGMENTS AND DECREES—*Continued.*

- he thereby estops himself from afterwards assailing the validity of the judgment on account of the defective power of attorney. *Giddens v. Crenshaw County*, 471.
5. *Confession of judgment, as release of errors.*—In a criminal case, the confession of a judgment with sureties for the fine and costs, as authorized by statute (Code, §§ 4454–55), is not a release of errors, and does not prejudice the right to revise the judgment by appeal or writ of error; though a different rule is declared by statute (*Ib.* § 3945) in civil cases. *Burke v. The State*, 399.
 6. *When decree is final.*—A decree in chancery is final, when it ascertains all the rights of the parties litigant, although there may be a reference to the register, to ascertain facts necessary for an account, and to state the account between the parties. *Cochran v. Miller*, 50.
 7. *Same.*—A decree rendered under a submission on pleadings and proof, granting relief to the complainant as prayed, is final, and necessarily involves and implies the overruling of demurrers to the bill, although they are not overruled in terms. *Ib.* 50.
 8. *Decree partly final, and partly interlocutory.*—A decree may be partly final, and partly interlocutory; as where it settles all the equities between the parties, and the principles on which relief is granted, but orders an account to be taken, or other proceedings to be had to carry it into effect; in which case, the chancellor can not, at a subsequent term, alter the principles on which relief was granted (as to which the decree is final), but may modify or change the interlocutory directions for carrying it into effect; and this court, on appeal, sued out after the completion of the statutory bar, is limited to an inquiry into the regularity of the subsequent proceedings, when they have progressed into a final decree which will support an appeal. *Ib.* 50.
 9. *Decree in chancery cause; effect as against third person, not party to suit.*—A decree in a chancery cause, under a bill filed by trustees for directions as to the rights of the parties claiming under the deed, and for a settlement of the trust, vesting in one of the claimants all the right and title of the grantor at the time the deed was executed, does not affect the claim or title of a third person, who was not a party to the suit, and who does not claim under the deed. *Ryan v. Beard's Heirs*, 306.
 10. *Judgment in statutory action establishing mechanic's lien; conclusiveness as against attaching creditor.*—An attachment having been levied on the property after the accrual of the mechanic's lien, the attaching creditor may be made a party to the statutory action for the enforcement of the lien, and he will then be bound by the judgment rendered in that action; but, if he is not made a party, he is not bound by its recitals as to the time when the lien accrued; and the property being sold under executions on the judgments rendered in both cases, and the money brought into court by the sheriff, the records of the two cases being the only evidence before the court, the money is properly awarded to the plaintiff in the attachment case, whose attachment was levied before the mechanic's claim was filed for record. *Young & Co. v. Stoutz & Co.*, 574.
 11. *Decree in favor of married woman; presumption in favor of regularity.* The rendition of a decree, on final settlement of an executor's accounts, in favor of a married woman alone, not joining her husband, is only an irregularity, available on error; and when the question is raised collaterally, as on motion to quash an execution issued on the decree, possibly the court would presume, in order to sustain the decree, that she had been made a free-dealer. *Werborn v. Pinney*, 591.
 12. *Judicial decisions overruling former decisions; effect on titles and con-*

JUDGMENTS AND DECREES—*Continued.*

tracts.—When titles have been acquired, judgments rendered, contracts performed, or transactions completed, based on judicial decisions which are afterwards overruled or reversed, titles and rights thereby acquired are not annulled or affected by such change in the judicial decisions; but this principle can not be so applied as to require that legal effect and operation shall be given to a conveyance according to the judicial decisions of this court which were of force when it was executed, which decisions were in conflict with repeated former adjudications, and have since been expressly overruled by later cases declaring and re-establishing the former decisions. *Kelly v. Turner*, 513.

13. *Conclusiveness of probate decree*, for sale of decedent's lands. *May v. Marks*, 249; *Pollard v. Hanrick*, 334.

JURORS AND JURY.

1. *Admission of facts; not amounting to waiver of trial by jury.*—An admission of the facts, upon which a motion to dismiss the suit is founded, is not a waiver of a trial by jury, nor equivalent to an agreement to substitute the court for the jury as a trier of the facts. *Moore v. Helms*, 369.

See, also, CRIMINAL LAW, 48-54.

LANDLORD AND TENANT.

1. *Assignment of lease.*—In an action for rent reserved by a written lease, a sole plaintiff suing as the assignee, a recovery can not be had on proof of an assignment to a partnership of which he is a member. *McMillan v. Otis*, 560.
2. *Extinction of rent, by tripartite agreement, between landlord, his creditor, and tenant.*—A tripartite agreement between the landlord, his creditor, and the tenant or lessee, by which the latter assumes the landlord's pre-existing debt to the amount of the stipulated rent for the year, executing to the creditor his negotiable promissory notes secured by mortgage, which the creditor accepts in satisfaction, *pro tanto*, of the landlord's indebtedness to him, entering a credit as for a partial payment, operates on the principle of novation and substitution, and effects an extinguishment of the original debts between the parties. *Comer v. Sheehan*, 452.
3. *Lease of premises by mortgagor.*—Under a mortgage of lands which are subject to an outstanding lease, the mortgagee is regarded as the assignee of the reversion, and is entitled to the rents past-due and unpaid, as well as those afterwards accruing, though the tenant is justified in paying them to the mortgagor, until they are intercepted by notice, or proper legal proceedings; but, when the lease is made by the mortgagor after the execution of the mortgage, it is not binding on the mortgagee, who may annul it at pleasure, and eject the lessee as a trespasser; and he can not treat the lessee as his tenant, by merely giving him notice to pay rent. *Ib.* 452.
4. *Waiver or abandonment of landlord's lien for rent.*—The landlord's lien on his tenant's crops, for rent, is not waived or impaired by taking the tenant's note with personal security; neither is it waived or abandoned by his consent to the removal of the crops from the premises. *Coleman v. Siler*, 435.
5. *Agreement construed, as to conflicting claims of landlord and merchant making advances.*—Under a written agreement between a landlord, claiming a statutory lien on his tenants' crops for rents and advances, and a merchant claiming a statutory lien for advances, by which it is stipulated that P., the merchant, "is to get

LANDLORD AND TENANT—*Continued.*

to-day three bales of cotton (two from Henry, and one from Nathan), *less the rents*, and out of the next lot of said Henry and Nathan S. [landlord] is to get two-thirds, provided it does not exceed their indebtedness to him for the year 1881, and so on until both claims are settled;” the lien for rent is expressly reserved and retained on the three bales delivered to the merchant, and the landlord’s lien for advances is, by necessary implication, abandoned as to those bales; while, as to the residue of the bales raised by the tenants named, two-thirds thereof is made subject to his claim for rent and advances, but only during the year 1881. *Ib.* 435.

6. *Waiver of landlord’s lien for advances.*—When a landlord agrees and promises, by letter addressed to a merchant, not to make any advances to his tenants if the merchant will furnish them with supplies, this necessarily postpones and subordinates his lien for any advances afterwards made to them, to the merchant’s lien for advances made on the faith of the letter; and in a controversy between him and a purchaser from the merchant, he can not claim to appropriate any part of the proceeds of sale of the tenant’s crop to his lien for such advances, until the merchant’s lien is fully paid and satisfied. *Ib.* 435.
7. *Contract between landlord and merchant furnishing supplies to tenants; respective rights and liens under.*—If a merchant agrees and promises, at the instance of the landlord, to make statutory advances to his tenants to a specified amount; and the landlord, in consideration thereof, agrees to be responsible for the debt, and transfers his rent contracts as collateral security for its payment; the merchant can not enforce this obligation, when it is shown that he failed to furnish supplies to the full amount specified; but, if he complied fully with his undertaking, he would be entitled to payment out of the crops, in preference to the landlord’s claim for rents. *Foster v. Napier*, 393.
8. *License to lessee to pass through lessor’s lands.*—The lessee of rented lands, which are accessible from the public road, has no right to use a shorter route across the other lands of the lessor, without his permission, express or implied; and if such permission can be implied from his use of the shorter route without objection, it is only a parol license, and revocable at pleasure; and after revocation by express prohibition or warning, the further use of the shorter route, by either the lessee or his tenants and servants, is a trespass. *Motes v. Bates*, 374.
9. *Landlord’s lien on crop and attachment to enforce it.*—A landlord’s lien on the crop grown on rented lands, for rent and advances (Code, §§ 3467–72), is neither a *jus ad rem*, nor a *jus in re*; and until he has sued out a valid attachment, and had it levied on the crops, he can not recover in a statutory claim suit against a third person. *Jackson v. Bain*, 328.
10. *Estoppel as between landlord and tenant.*—As a general rule, when a tenant is sued for rent, or for the possession on the expiration of his term, he can not dispute the title of his landlord, nor set up a paramount title in himself or a third person; but he may show that the landlord’s title has expired by limitation, or by operation of law, or that he accepted a lease, or attorned to the plaintiff as landlord, under a mistake of fact, and in ignorance that the title was in himself; or that he was induced to attorn, or to accept a lease, through fraud, imposition, or undue advantage; or that he has been evicted by title paramount. *Farris & McCurdy v. Houston*, 162.
11. *Same.*—A tenant who has entered under the mortgagee, or under an assignee of the mortgagee, can not defeat a recovery by his landlord, by showing the subsequent grant of letters of administration

LANDLORD AND TENANT—*Continued.*

- to himself on the estate of the deceased mortgagor, and the insolvency of the estate, and claiming an extinguishment of the mortgage debt by the rents and profits received. *Ib.* 162.
12. *Whether contract is sale or lease, purchase or tenancy.*—A contract may be so framed as to operate either as a sale or as a lease—either a purchase or a tenancy; as in *Collins v. Whigham* (58 Ala. 438), where the contract was construed as giving the option to the purchaser, in the first instance, to treat it as a purchase or as a lease, and, on his failure to express his election by the day named, it was held that the vendor might elect. *Wilkinson v. Roper*, 140.
 13. *Same.*—Where lands are conveyed by absolute deed, with covenants of warranty, the purchaser giving his written obligation to deliver twelve bales of cotton to the vendor, in annual installments of four bales each, and a mortgage on the land to secure their payment; a stipulation in the mortgage in these words, "And in case of failure to make the first two payments on said land, then we agree and hereby promise to pay said W. [vendor] two bales of cotton each year for the rent of said lands," does not, of itself, show that the contract was a conditional sale, dependent on the payment of the first two obligations at maturity, and, on default of such payment, operating only as a lease from year to year. But the acts and conduct of the parties under the contract, as proved by receipts given and accepted, and other writings, show that they so understood and regarded it, or subsequently modified it, and that the cotton delivered was paid, not as purchase-money, but as rent. *Ib.* 140.
 14. *Action on the case, for conversion of crop, with knowledge of lien; variance.*—Under a complaint claiming damages for the defendant's sale and conversion of a crop raised on rented lands, with knowledge of plaintiff's statutory lien as landlord for rent, whereby the lien was destroyed and lost, a recovery can not be had on proof of a statutory lien for advances. *Coleman v. Siler*, 435.

LIEN.

1. Of attachment. See ATTACHMENT, 3.
2. Of attorney, or solicitor. See ATTORNEY AT LAW, 1, 2.
3. Of execution. See EXECUTION, 2.
4. Of landlord. See LANDLORD AND TENANT, 4-9.
5. Of mechanic, or contractor. See MECHANIC'S LIEN.
6. Of vendor. See VENDOR AND PURCHASER, 9-14.

LIMITATIONS, STATUTE OF.

1. *As between trustee and beneficiaries.*—The statutes of limitation do not apply to express trusts, which are peculiarly and exclusively the subjects of equity jurisdiction, the possession of the trustee being considered the possession of the *cestuis que trust*, and not becoming adverse until there has been an open disavowal of the trust, brought home to the knowledge of the beneficiary with unquestionable certainty; and such a trust is only barred, on the doctrine of prescription, by the lapse of twenty years. *McCarthy v. McCarthy*, 546.
2. *Fraud, as exception to statute of limitations.*—An infant remainderman under a deed, residing from infancy with the trustee as a member of his family, and being kept in ignorance of the trust and her rights under it, until the discovery and surrender of the deed on the death of the trustee, is allowed twelve months after such discovery within which to file a bill for an account of rents and profits received (Code, § 3242), if the statute of limitations be

LIMITATIONS, STATUTE OF—*Continued.*

applicable to the case; and she is not chargeable with constructive notice of the deed, under such circumstances, because it had been duly recorded many years before. *Ib.* 546.

3. *Limitation of action against railroad company.*—A claim for damages against a railroad company, for stock killed or injured, is "barred, unless complaint is made within six months after such killing or injury" (Code, § 1711); but a presentment of the claim in writing, within the six months, to the president, treasurer, superintendent, depot-agent, or agent specially appointed to look after such claims, is sufficient to avoid the bar, although suit is not commenced until after the lapse of six months. *Railroad Co. v. Bayliss*, 150.
4. *Limitation of appeal.*—Thirty days being the limitation of an appeal from a judgment or decree on a contest of the probate of a will (Code, § 3954), an appeal sued out on the 5th April, from a judgment rendered on the 4th March, will be dismissed on motion. *Lanier v. Russell*, 364.
5. *Statute of limitations to plea of set-off.*—When a set-off is pleaded, and the statute of limitations is replied thereto, the statutory bar is to be computed, not to the commencement of the action, but to the time when the plaintiff's right of action accrued (Code, § 2996); and if the claim was then barred, it is not a "legal subsisting claim," and is not available as a set-off. *Washington v. Timberlake*, 259.

MALICIOUS PROSECUTION.

1. *Action lies against corporation.*—An action on the case for a malicious prosecution may be maintained against a corporation. (The case of *Owsley v. M. & W. P. Railroad Co.*, 37 Ala. 360, on this point, is against the weight of more recent decisions, and is overruled.) *Jordan v. Ala. Gr. So. Railroad Co.*, 85.
2. *Infancy of plaintiff, not relevant evidence.*—In an action for a malicious prosecution, the fact that the plaintiff was a minor at the time of the assault and battery by him, on which the prosecution was founded, is not relevant to the issue of malice or probable cause, and is not admissible as evidence. *Motes v. Bates*, 374.
3. *Conduct of prosecutor connected with arrest.*—The conduct and movements of the prosecutor on the day of the plaintiff's arrest, while he was in the custody of the sheriff and attempting to give bail, are competent evidence for the plaintiff, as tending to show the degree of interest on the part of the defendant in the prosecution, and bearing on the question of an improper motive on his part. *Ib.* 374.

MANDAMUS.

1. *Lies when.*—When the chancellor improperly sets aside or modifies, at a subsequent term, a final decree rendered at a former term, the remedy is by *mandamus*, and an appeal does not lie. *Cochran v. Miller*, 50.

MARSHALLING ASSETS. See CHANCERY, 13.

MARSHALLING SECURITIES. See CHANCERY, 14.

MECHANIC'S LIEN.

1. *Accrual of, and priority as against attachment.*—A mechanic's statutory lien for labor performed, or materials furnished, accrues from the time at which the labor is done or commenced, or the materials are furnished (Code, §§ 3440-47); and if the claim is properly

MECHANIC'S LIEN—*Continued.*

filed for record within the time prescribed, followed up by suit within ninety days (§ 3454), and prosecuted to judgment without unnecessary delay, the lien is superior to that of an attachment levied on the property subsequent to its accrual, though before the commencement of the suit to enforce it. *Young & Co. v. Stoutz & Co.*, 574.

2. *Same; when creditor is not made party to suit.*—An attachment having been levied on the property after the accrual of the mechanic's lien, the attaching creditor may be made a party to the statutory action for the enforcement of the lien, and he will then be bound by the judgment rendered in that action; but, if he is not made a party, he is not bound by its recitals as to the time when the lien accrued; and the property being sold under executions on the judgments rendered in both cases, and the money brought into court by the sheriff, the records of the two cases being the only evidence before the court, the money is properly awarded to the plaintiff in the attachment case, whose attachment was levied before the mechanic's claim was filed for record. *Ib.* 574.

MORTGAGE.

1. *Rents and profits, as between mortgagor and mortgagee.*—The mortgagor is entitled to the rents, income and profits of the mortgaged property, until the mortgagee asserts his right to them by taking possession, giving notice in the nature of a demand, or filing a bill for foreclosure, and asking the appointment of a receiver; and where possession is taken, without objection on the part of the mortgagor, by the holder of a mortgage which is afterwards declared void at the instance of a second mortgagee, in a suit seeking an account and foreclosure, the rents accruing during his possession, from the filing of the bill, may be claimed and intercepted by the mortgagee, at any time before they have been paid over to the mortgagor. *Falkner v. Campbell Printing Press Co.*, 359.
2. *Same.*—As against all the world, except the mortgagee and those claiming under him, the mortgagor is regarded as the owner of the mortgaged property, and has the right to convey or lease them, subject to the mortgage; and he is entitled to the rents and profits, even after the law-day and default made, until they are intercepted by some active assertion or claim on the part of the mortgagee, either by notice to the tenant in possession, or by bill in equity to foreclose. *Comer v. Sheehan*, 452.
3. *Lease of premises by mortgagor.*—Under a mortgage of lands which are subject to an outstanding lease, the mortgagee is regarded as the assignee of the reversion, and is entitled to the rents past-due and unpaid, as well as those afterwards accruing, though the tenant is justified in paying them to the mortgagor, until they are intercepted by notice, or proper legal proceedings; but, when the lease is made by the mortgagor after the execution of the mortgage, it is not binding on the mortgagee, who may annul it at pleasure, and eject the lessee as a trespasser; and he can not treat the lessee as his tenant, by merely giving him notice to pay rent. *Ib.* 452.
4. *Purchase by mortgagee at sale under power; notice to tenant in possession.*—When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, the sale is valid as between the parties, notwithstanding the statute of frauds, unless set aside within two years; and if the land is in the possession of a tenant, under a lease executed by the mortgagor subsequent to the mortgage, statutory notice to him by the mortgagee, as such purchaser, vests in him the right to the possession in the same manner as

MORTGAGE—*Continued.*

if such tenant had attorned to him" (Code, § 2878); but, while he may, possibly, thereby acquire a right to maintain an action for future use and occupation, he can not recover rents past-due and unpaid, which the mortgagor had already transferred to another. *Ib.* 452.

5. *Mortgagee's right to possession, or use and occupation.*—A mortgagee, or trustee in a deed in the nature of a mortgage, is entitled to the immediate possession, and may maintain an action for use and occupation against the tenant in possession, unless the mortgage contains some stipulation, express or implied, postponing his right to take possession; but, where the mortgage contains an express stipulation, that it shall be void, if the secured notes are paid at maturity, and that if the mortgagor "shall fail to pay said notes at their maturity, then it shall be lawful for the said M. [mortgagee] to take possession of said lands," his right to take possession is, by clear implication, deferred until the maturity of the notes. *McMillan v. Otis*, 560.
6. *Payment of mortgage debt, as defense to action founded on mortgage.* When the mortgagee of personal property brings detinue, or the statutory action for the recovery of specific chattels, and the plea of payment is interposed, the inquiry is limited to the mortgage debt, and other debts or matters of accounts between the parties are not within the issue. If any part of the mortgage debt remains unpaid, though the mortgagee may owe the mortgagor another debt of equal or greater amount, the plea is not sustained, and the plaintiff is entitled to recover; and if the mortgage debt is fully paid, the defendant is entitled to a verdict, without regard to other debts or demands; consequently, the judgment on such issue is conclusive only as to the mortgage debt. *Foster v. Napier*, 393.
7. *Purchase by mortgagee at sale under mortgage; election and remedies of mortgagor.*—When lands are sold under a power contained in a mortgage, and the mortgagee himself becomes the purchaser at the sale, the mortgagor has an election, if seasonably expressed, either to affirm or disaffirm the sale, without regard to its fairness, or to the sufficiency of the price paid; but a bill which merely seeks to set aside the sale, alleging nothing as to the state of the account, containing no tender or offer to pay what is due, or to do equity, and not asking to redeem, is without equity. *Garland v. Watson*, 323.
8. *Legal rights of mortgagee.*—Under the repeated decisions of this court, a mortgage is something more than a mere security for a debt: it vests in the mortgagee an immediate estate in the lands conveyed, and gives him a right to enter at once, in the absence of an express stipulation to the contrary; and after the law-day, default being made in the payment of the secured debt, his estate becomes absolute at law, nothing remaining in the mortgagor but the equity of redemption, of which courts of law take no notice. *Farris & McCurdy v. Houston*, 162.
9. *Payment of rent to mortgagee; rents and profits, as between mortgagor and mortgagee.*—The payment of rent to a mortgagee who is in possession, or to whom the tenant has attorned to avoid eviction, extinguishes the rent, and releases the tenant from liability to the mortgagor, under whom he entered; and while a court of equity will, under a bill to redeem by the mortgagor, apply rents and profits received by the mortgagee to the payment and discharge, *pro tanto*, of the mortgage debt, the law makes no such application of them, and no inquiry is allowed, at law, into the payment or extinguishment of the mortgage debt, in order to defeat the legal estate or title of the mortgagee. *Ib.* 162.

MORTGAGE—Continued.

10. *Estoppel between mortgagor and mortgagee, and their privies in estate.*
A tenant who has entered under the mortgagee, or under an assignee of the mortgagee, can not defeat a recovery by his landlord, by showing the subsequent grant of letters of administration to himself on the estate of the deceased mortgagor, and the insolvency of the estate, and claiming an extinguishment of the mortgage debt by the rents and profits received. *Ib.* 162.
11. *Reformation of mortgage as against subsequent judgment creditors.*
The statutes of registration, for the protection of judgment creditors against unrecorded conveyances (Code, §§ 2166-7), relate only to conveyances of the legal estate in lands, and have no application to mere equitable estates or interests, which are not subject to the lien of executions or judgments, and are not within the policy of the statutes; and there is nothing in the statutes which, as in favor of judgment creditors, forbids the reformation of a recorded mortgage by a court of equity, so as to make it include lands which were omitted by mistake. *Bailey, Davis & Co. v. Timberlake*, 221.
12. *Foreclosure of mortgage, by sale under power; statutory right of redemption.*—A sale of lands under a power contained in a mortgage, or deed of trust for the benefit of a creditor, cuts off the mortgagor's equity of redemption as effectually as a decree of strict foreclosure, and leaves nothing in him but the statutory right or privilege of redemption (Code, §§ 2877-80), which is not subject to levy and sale under execution at law. *Ib.* 221.
13. *Waiver of equity of redemption, or of statutory right of redemption.*
The mortgagor's equity of redemption can not be waived or extinguished by any agreement entered into contemporaneously with the execution of the mortgage, though a subsequent assignment, if made *bona fide*, will be upheld; and the reason and policy of this principle are equally applicable to a waiver or release of the statutory right of redemption. *Parmer v. Parmer*, 285.
14. *Rents and profits, and permanent improvements.*—Rents and profits which accrued before a tender and refusal, may be set off against the permanent improvements shown to have been made, though any excess thereof above the value of such improvements can not be recovered against the mortgagee, when in possession under a sale foreclosing the mortgage; but the mortgagor is entitled, on redemption, to all the rents and profits accruing after his tender and offer to redeem, and to interest on each year's annual rent. *Ib.* 285.
15. *What are "lawful charges" on redemption.*—Cross demands in favor of the mortgagee, not embraced in or covered by the mortgage, are not a part of the "lawful charges" (Code, § 2879) which the mortgagor, seeking to redeem after a sale, is required to pay or tender; nor can he be charged with the value of permanent improvements erected after the tender and refusal. *Ib.* 285.
16. *Averments of bill for account and redemption.*—Where the children of the mortgagor, claiming as subsequent purchasers from him, file a bill against the mortgagee and purchasers at a sale under the mortgage, alleging fraud and oppression practiced by the mortgagee in the matter of the accounts, and asking an account and redemption, "they must allege the true state of the account between the mortgagor and mortgagee—that is, must allege the amount claimed by the mortgagee, and the amount admitted by the mortgagor, or show the several items contested between them." General averments that the balance due, if any, was inconsiderable, and that the purchasers bought with knowledge of the true state of the account, are not sufficiently certain and definite. *Conner v. Smith*, 115.

MORTGAGE—*Continued.*

17. *Recitals as to consideration, on bill for reformation.* *Roney v. Moss*, 390.
18. *Notice of unrecorded mortgage; when purchaser is not chargeable with.*—A purchaser of cotton, or other crops, is not chargeable with notice of an unrecorded mortgage on them, given to secure the payment of the purchase-money for the land, because he has knowledge of the existence of the debt for the unpaid purchase-money. *Bell v. Tyson*, 353.

NEGLIGENCE. See RAILROAD, 5-9.

NONSUIT. See ERROR AND APPEAL, 6.

NOTARY PUBLIC. See ATTACHMENT, 1.

OFFICERS. See ATTACHMENT, 2.

OVERRULED CASES; CASES DOUBTED, LIMITED, &c.

1. *Abercrombie v. Conner*, 10 Ala. 296, doubted in *Cowan & Co. v. Sapp*, 44.
2. *Beck v. Simmons*, 7 Ala. 71, doubted in *Robbins v. Battle House Company*, 499.
3. *Givens v. The State*, 5 Ala. 747, limited in *Jackson v. The State*, 26.
4. *King v. Broome*, 10 Ala. 819, limited in *Pickett v. Pope*, 122.
5. *Lankin v. Reese*, 7 Ala. 170, doubted in *Robbins v. Battle House Company*, 499.
6. *Long v. Brown*, 4 Ala. 622, doubted in *Robbins v. Battle House Company*, 499.
7. *Owsley v. M. & W. P. Railroad Co.*, 37 Ala. 360, overruled in *Jordan v. Ala. Gr. So. Railroad Co.*, 85.
8. *Price v. Tally*, 18 Ala. 21, limited in *Pickett v. Pope*, 122.
9. *Thrasher v. Ingram*, 32 Ala. 645, limited in *Pickett v. Pope*, 122.
10. *Walker v. Fenner*, 28 Ala. 367, limited in *Pickett v. Pope*, 122.
11. *Williams v. The State*, 52 Ala. 411, declared erroneous in *Bain v. The State*, 38.

PARTITION. See CHANCERY, 16-21.

PARTNERSHIP.

1. *Authority of partner.*—A mercantile business not being necessarily or usually incident to the business of farming, the partner who conducts the business of a partnership in farming has no implied or incidental authority to carry on a mercantile business on joint account in connection with it. *Humes v. O'Bryan & Washington*, 64.
2. *Liability of partner to third persons.*—Although there may be no partnership in fact, a person who suffers himself to be held out as a partner with another, may be charged as a partner for debts contracted with third persons, who dealt with the supposed partnership in ignorance of the true relations existing between the parties. *Ib.* 64.
3. *Limitation of partner's authority; burden of proof.*—Any private agreement between partners, or limitation placed on the authority of the partner by whom the business is conducted, is of no avail against a creditor who has contracted in ignorance of it; and the *onus* of showing notice or knowledge of such agreement or limitation is on the partner who disputes his liability on an account contracted within the scope of the partnership. *Ib.* 64.

PARTNERSHIP—*Continued.*

4. *Declarations of partner; admissibility as against another.*—The declarations of one person, as to the existence of a partnership between himself and another person, are not admissible evidence against the latter, to prove the fact of partnership, unless they were made in his presence, or fall within some recognized exception to the general rule excluding hearsay evidence. *Ib.* 64.
5. *Same.*—The declarations of one partner, while in possession and carrying on the business, strictly explanatory of his possession, whether against interest or not, are admissible as evidence against the person sought to be charged as his co-partner, in corroboration of other and independent evidence of the alleged partnership; but his declarations as to where he bought the goods, or a portion of them, or on whose account, being merely narrative of a past transaction, do not come within this principle; and his declaration of his inability to induce the defendant to become his surety for a sum of money, which he wished to borrow, is not admissible. *Ib.* 64.
6. *Same; proof of partnership.*—On this principle, the defendant in this case being sued as partner in a mercantile business with a person since deceased, by whom the business was conducted; *held*, that the acts and declarations of the deceased, while in possession of the goods, and carrying on the business, so far as they were explanatory of his possession, as indicating whether the goods were his own, or were claimed by him as joint partner with another person, were competent and admissible as evidence, as part of the *res geste*; but were not admissible as evidence, as against the defendant, of the existence of the alleged partnership, unless some notice or knowledge of them was brought home to him; though they were relevant to corroborate or rebut, as the case may be, other evidence offered to prove the existence or non-existence of such partnership. *Ib.* 64.
7. *Same.*—The existence or non-existence of a partnership can not be proved by general reputation; nor can the character of a person's possession of a stock of goods be proved by any general understanding in the neighborhood in which he carries on his business. *Ib.* 64.
8. *Same.*—The existence of a partnership having been once shown by independent testimony, proof of a general reputation, or common report of its existence, in the neighborhood in which the business is carried on, is competent to show a probable knowledge of the fact by the plaintiff, on the principle that a person would be likely to know any fact generally known in his neighborhood; and for the like reason, the notoriety of a dissolution, or, perhaps, of the non-existence of a partnership, may be shown, to charge a party with implied notice of the fact; but this principle can not be so extended, as to charge a party residing in a distant city with implied knowledge or notice of a fact, because it is generally known in a remote local neighborhood, without proof of other facts tending to show that he had opportunities of hearing the common report. *Ib.* 64.
9. *Marshalling assets between individual and partnership creditors.* Partnership creditors can assert no lien on partnership property, for the payment of their debts; though such lien may be worked out for their benefit, by a partner asserting his right to have the partnership effects applied to the extinguishment of the partnership liabilities; and a court of equity, in administering the effects of an insolvent partnership, will apply them primarily to the payment of partnership debts, while the separate property of the individual partners will be devoted primarily to the payment of their individual debts. *Evans, Fite, Porter & Co. v. Winston*, 349.

.PAYMENT.

1. *Acceptance of part, in satisfaction of debt.*—At common law, a promise by the creditor to accept less than the full amount of his debt, or its acceptance, no release being given, and the evidence of the debt not being surrendered, did not operate as a payment, nor as an accord and satisfaction; but, under the statute declaring that "all receipts, releases, and discharges in writing, must have effect according to the intention of the parties" (Code, § 3039), such acceptance may amount to full satisfaction. *Cowan & Co. v. Sapp*, 44.
2. *Payment of mortgage debt, as defense to action founded on mortgage.* When the mortgagee of personal property brings detinue, or the statutory action for the recovery of specific chattels, and the plea of payment is interposed, the inquiry is limited to the mortgage debt, and other debts or matters of account between the parties are not within the issue. If any part of the mortgage debt remains unpaid, though the mortgagee may owe the mortgagor another debt of equal or greater amount, the plea is not sustained, and the plaintiff is entitled to recover; and if the mortgage debt is fully paid, the defendant is entitled to a verdict, without regard to other debts or demands; consequently, the judgment on such issue is conclusive only as to the mortgage debt. *Foster v. Napier*, 393.
3. *Payment of rent to mortgagee.*—The payment of rent to a mortgagee who is in possession, or to whom the tenant has attorned to avoid eviction, extinguishes the rent, and releases the tenant from liability to the mortgagor, under whom he entered; and while a court of equity will, under a bill to redeem by the mortgagor, apply rents and profits received by the mortgagee to the payment and discharge, *pro tanto*, of the mortgage debt, the law makes no such application of them, and no inquiry is allowed, at law, into the payment or extinguishment of the mortgage debt, in order to defeat the legal estate or title of the mortgagee. *Farris & McCurdy v. Houston*, 162.

PLEADING AND PRACTICE.

1. *Who is proper party plaintiff.*—A judgment is not a "contract, express or implied, for the payment of money," within the meaning of the statute which requires an action on such contract to be brought in the name of the party really interested (Code, § 2890); and an action on it is properly brought, notwithstanding its assignment, in the name of the original plaintiff, and revived in the name of his personal representative. *Wolfe v. Eberlein*, 99.
2. *Declaring on debt discharged by bankruptcy.*—When a subsequent promise is made to pay a debt which has been barred by a discharge in bankruptcy, the creditor may sue directly on the new promise, or, at his election, on the original debt, and reply the new promise to a plea setting up the discharge in bankruptcy; and if the original debt was reduced to judgment before the new promise was made, he may sue on the judgment. *Ib.* 99.
3. *Complaint; what counts may be joined.*—Counts in trover and in case may be joined in the same complaint, but counts in trover can not be joined with counts in assumpsit. *Mobile Life Insurance Co. v. Pruett*, 170.
4. *When case lies, and when assumpsit.*—For the breach of an ordinary contract, which involves no element of tort, an action of assumpsit is the proper remedy, and an action on the case will not lie; but, when a duty is imposed by the contract, or grows out of it by legal implication, and injury results from the violation or disregard of that duty, an action on the case will lie to recover damages, although an action of assumpsit might also be maintained for the breach of duty. *Ib.* 170.

PLEADING AND PRACTICE—*Continued.*

5. *Same.*—Whenever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, the party injured may maintain an action on the case; and if the transaction had its origin in a contract between the parties, the contract is mere matter of inducement. *Ib.* 170.
6. *Count held not to be in case.*—A count by which the plaintiff claims damages, for that whereas, on the — day of —, plaintiff and defendant entered into an agreement, whereby plaintiff became agent of defendant, a corporation engaged in the business of life-insurance, and, under said agreement, was to solicit and procure the taking out of policies in defendant's said company, and was to receive, as compensation for his said services, certain commissions upon the premiums on said policies, and commissions upon renewal premiums; and then avers, "that plaintiff engaged actively in said business, giving his time, energies and attention to the business, and expending large sums of money in building up and extending defendant's business; that said contract was renewed from time to time, until, to-wit, on the 3d day of April, 1876, said contract was so modified as to give or entitle plaintiff to a life interest of ten per-cent. in all renewal premiums upon all ordinary life policies then in force, procured by him, or issued through his agency, or which should be thereafter procured through his agency, and a life interest of twenty per-cent. on all yearly renewal term policies; that a large majority of the policies issued by defendant during plaintiff's connection with said company, to-wit," &c., "were issued upon applications sent in through plaintiff's agency, and were in force; and that defendant, disregarding the rights of plaintiff under said agreement, and in violation of said agreement, did, to-wit, on the 1st day of September, 1878, wrongfully discharge plaintiff from its service, and deny him all right to said renewal premiums, or any interest therein, and still refuses to recognize his interest therein,"—is in assumption, and not in case. *Ib.* 170.
7. *Action against stakeholder; sufficiency of complaint.*—In an action against a stakeholder, to recover money deposited on a wager, and by him paid over to the supposed winner, it is not necessary that the complaint should, by its averments, negative the fact that the money was so paid before notice not to pay, that being defensive matter merely. *Lewis v. Bruton*, 317.
8. *Substitution of complaint.*—A complaint may be substituted, when the original has been lost or mislaid, on proof of the correctness of the substitute and its substantial correspondence with the original; and a difference between the two in the description of the land sued for is no objection to the allowance of the substitute, when there is no dispute as to the identity of the land in controversy. *Pickett v. Pope*, 122.
9. *Amendment of complaint.*—The introduction of a new cause of action, by an amended count, is a departure from the original complaint, and is not allowable. *Mobile Life Ins. Co. v. Randall*, 170.
10. *Same.*—A recovery can not be had under the common money counts, for the proceeds of cotton sold after the commencement of the suit, although they were added to the complaint by amendment subsequent to the sale. *Graham v. Myers & Co.*, 432.
11. *Plea of tender.*—When a tender is pleaded, accompanied with the payment of the money into court, and the plea is sustained, the defendant is entitled to a verdict, but the money deposited becomes the property of the plaintiff. *Foster v. Napier*, 393.

PLEADING AND PRACTICE—*Continued.*

12. *Misnomer, and variance.*—The names *Booth* and *Boothe* are strictly *idem sonans*. *Jackson v. The State*, 26.
13. *Plea of not guilty, and disclaimer.*—In a statutory action in the nature of ejectment, the plea of not guilty is a conclusive admission of the defendant's possession of the land sued for, and a denial of the plaintiff's title thereto (Code, §§ 2962-3); while a disclaimer is an admission of plaintiff's title, and a denial of defendant's possession; and these two defenses, being incompatible, can not be pleaded together in the same action. *McQueen v. Lampley*, 408.
14. *Setting aside service of process.*—The issue of the summons and complaint, not the service of process, is the commencement of the action; and the setting aside of the service, on account of irregularities, does not abate or discontinue the suit. *Railroad Co. v. Bayliss*, 150.
15. *Waiver of defective service or answer, by appearance.*—Although the answer of the agent is not accompanied with the prescribed affidavit (Code, § 3222), the defect is waived by the subsequent appearance of the corporation, recognizing his authority to answer for it; and the recitals of the record in this case, as to the appearance of the parties by attorney, and continuances by consent, affirmatively show such appearance by the corporation. *Railroad Co. v. Whorley*, 264.
16. *Motion to dismiss; when allowable.*—A motion to dismiss a suit is, ordinarily, founded upon matter of record apparent on the face of the proceedings, and can not be based on extrinsic matters; unless, perhaps, on a release given, or an agreement to dismiss made pending the suit; nor can it be made to subserve the purpose of a plea in bar, or to devolve upon the court a summary determination of the merits of the case. *Moore v. Helms*, 369.
17. As to the argument of counsel, see ATTORNEY AT LAW.

POWERS.

1. *Testamentary power; by whom executed.*—A power conferred by will, implying personal confidence in the donee, can only be exercised by the person named; and if he disclaims, or refuses to execute the trust, the power will be considered as revoked and absolutely annulled. *Hinson v. Williamson*, 180.
2. *Testamentary power to executors to sell lands; how exercised, at common law.*—At common law, a naked power to sell lands, or to do any other act, given by will to persons named as executors, could only be exercised by the joint act of all, and did not survive; but, if the power was coupled with an interest, it was capable of execution by the executors who qualified, or the survivor of them; and if a power of sale was given to executors as such, and not *nominatim*, it might be exercised by the qualifying or surviving executor, unless the will expressly pointed to a joint execution. If there was a devise to executors by name, with directions to sell, the descent to the heir was intercepted, the title passed to the donees, coupling an interest with the power, and the power might be exercised by the executors who qualified, or the survivor of them; but, under a devise that executors should sell lands, the descent to the heir was not intercepted, no estate passed to the executors, and the naked power of sale conferred on them could only be exercised by the joint act of all. *Robinson v. Allison*, 254.
3. *Same; under statutory provisions.*—To obviate the inconvenience found to result from these common-law rules, it is now provided by statute that, when lands are devised to several executors to sell, or a naked power of sale is given to them by will, the power may be exercised by those who qualify or are acting, the survivor or

POWERS—*Continued.*

survivors of them (Code, § 2218); and in determining whether a power is naked (incapable of other than a joint execution), or may be executed by the qualified, acting or surviving executors, the intention of the testator, as collected from the whole will, must control, the power being construed with greater or less latitude with reference to that intent. *Ib.* 254.

See, also, WILLS.

RAILROADS.

1. *Liability of railroad company as common carrier, and as warehouseman.*—When a railroad company receives goods for transportation, safely transports them to the point of destination, informs the consignee of their arrival, and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier are at end; and if the goods are then left in its custody, its liability for a subsequent loss or damage is that of a warehouseman only. *Kennedy Brothers v. M. & G. Railroad Co.*, 430.
2. *Same; variance.*—In an action against a railroad company as a common carrier, for the loss of goods, the complaint being in the form prescribed by the Code (Form No. 13, page 703), a recovery can not be had on proof of a loss which occurred after the defendant's duty and liability as a carrier had terminated, and while the goods had been left in its custody as a warehouseman. *Ib.* 430.
3. *Presentment of claim, and limitation of action.*—A claim for damages against a railroad company, for stock killed or injured, is "barred, unless complaint is made within six months after such killing or injury" (Code, § 1711); but a presentment of the claim in writing, within the six months, to the president, treasurer, superintendent, depot-agent, or agent specially appointed to look after such claims, is sufficient to avoid the bar, although suit is not commenced until after the lapse of six months. *Railroad Co. v. Bayliss*, 150.
4. *Appraised value of animal killed, as admission against owner, and explanation thereof.*—The plaintiff having procured appraisers to value his horse which was killed, and to certify to the correctness of his claim at their valuation against the railroad company, this appraisement is an admission on his part of the value of the horse as stated; but it is subject to be explained, or rebutted, by proof of any fact connected with the appraisement which is admissible as a part of the *res gestæ*; as, that he told them to put the lowest cash value on the animal, not exceeding the sum fixed by them, because the agent of the railroad company had promised that the claim should be paid at once without abatement. *Ib.* 150.
5. *Burden of proof as to negligence.*—In an action against a railroad company, to recover damages for injuries to stock, when the fact of injury by the defendant or its servants has been shown, a *prima facie* case is made out for the plaintiff, and the *onus* is then cast on the defendant "to acquit itself of negligence, or to show a compliance with the statute;" that is, if the injury occurred at one of the places specified in the statute, and under the circumstances therein detailed, a compliance with the requisitions of the statute must be shown; and if under other circumstances, the evidence must be sufficient to satisfy the jury that it occurred without such negligence as, under the general law governing the doctrine of negligence, would render the defendant liable. *Ib.* 150.
6. *Duties of engineer; facts excusing injury.*—It being shown that the horse which was killed leaped on the track in such close proximity to the engine that it was impossible to stop or check the train in time to avoid the injury, this would not only authorize a verdict

RAILROADS—*Continued.*

for the defendant, but would require it, "provided it was also shown that the engineer kept a proper look-out for stock, and could not have seen the horse, even by the exercise of the very great diligence exacted by his situation;" and in determining whether the engineer kept a proper look-out, "the jury must consider that other duties also devolve upon him, which may interfere, to some extent, with the constancy of uninterrupted observation." *Ib.* 150.

7. *Negligence vel non; when question of law, and when of fact.*—The question of negligence *vel non* is a question of law for the decision of the court, "only when the case is so free from doubt that the inference of negligence to be drawn from the facts is clear and certain;" in all other cases, it is a question of fact for the determination of the jury. *Ib.* 150.
8. *Same.*—Whether it is negligence for an engineer to run his train at a stated number of miles per hour, is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, &c; and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident. *Ib.* 150.
9. *Contributory negligence as defense.*—In an action against a railroad company, to recover damages for personal injuries, a charge which states the correct rule as to negligence, but ignores the evidence tending to show contributory negligence, is not therefore erroneous; the question of contributory negligence being defensive in its character, and properly calling for an explanatory charge. *Railroad Co. v. Clark*, 443.
10. *Municipal bonds in aid of railroad; questions relating to validity of.* *The State v. City Council of Montgomery*, 226.
11. *Claim of exemption from taxation, under special charter.* *Mobile & Spring Hill Railroad Co. v. Kennerly*, 566; *Street Railway Co. v. Kennerly*, 583.

RECOUPMENT. See DAMAGES, 4.

REDEMPTION OF REAL ESTATE.

1. *Waiver of equity of redemption, or of statutory right of redemption.* The mortgagor's equity of redemption can not be waived or extinguished by any agreement entered into contemporaneously with the execution of the mortgage, though a subsequent assignment, if made *bona fide*, will be upheld; and the reason and policy of this principle are equally applicable to a waiver or release of the statutory right of redemption. *Parmer v. Parmer*, 285.
2. *Rents and profits, and permanent improvements.*—Rents and profits which accrued before a tender and refusal, may be set off against the permanent improvements shown to have been made, though any excess thereof above the value of such improvements can not be recovered against the mortgagee, when in possession under a sale foreclosing the mortgage; but the mortgagor is entitled, on redemption, to all the rents and profits accruing after his tender and offer to redeem, and to interest on each year's annual rent. *Ib.* 285.
3. *What are "lawful charges" on redemption.*—Cross demands in favor of the mortgagee, not embraced in or covered by the mortgage, are not a part of the "lawful charges" (Code, § 2879) which the mortgagor, seeking to redeem after a sale, is required to pay or tender;

REDEMPTION OF REAL ESTATE—*Continued.*

nor can he be charged with the value of permanent improvements erected after the tender and refusal. *Ib.* 285.

4. *Foreclosure of mortgage, by sale under power; statutory right of redemption.*—A sale of lands under a power contained in a mortgage, or deed of trust for the benefit of a creditor, cuts off the mortgagor's equity of redemption as effectually as a decree of strict foreclosure, and leaves nothing in him but the statutory right or privilege of redemption (Code, §§ 2877-80), which is not subject to levy and sale under execution at law. *Bailey, Davis & Co. v. Timberlake*, 221.

REFORMATION. See CHANCERY, 22-26.

REMAINDERS.

1. *Sale of absolute property by tenant for life; effect on remainder.*—The principle decided in the case of *King v. Broome* (10 Ala. 819), and followed in several other cases (*Price v. Tally*, 18 Ala. 21; *Walker v. Fenner*, 28 Ala. 367; *Thrasher v. Ingram*, 32 Ala. 645), as to the effect of a sale of the entire property by a tenant for life on the estate and rights of a vested remainder-man, applies only to personal property, and the court declines to extend it to cases involving real property. *Pickett v. Pope*, 122.
2. *Adverse possession, as between tenant for life (or purchaser from him) and remainder-man.*—The possession of land by a tenant for life can not be adverse to the remainder-man; and if he sells and conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not, and can not be during the continuance of the life-estate, adverse to the remainder-man. *Ib.* 122.
3. *Permanent improvements by adverse possessor.*—"Adverse possession," as the words are used in the statute which gives to the defendant in ejectment, or the statutory action in the nature of ejectment, the right to suggest upon the record that he and those whose possession he has "have had adverse possession" for three years before the commencement of the suit, and have erected permanent improvements on the land (Code, §§ 2951-54), "must be construed to mean just the same character of hostile possession as will put in operation the statute of limitations, except that it must be *bona fide* under color or claim of title;" and a purchaser from the tenant for life, though his deed purports to convey the absolute property, can not claim the benefit of the statute, in an action brought by the remainder-man within three years after the death of the tenant for life. *Ib.* 122.

SET-OFF.

1. *Recoupment, and set-off.*—A claim of recoupment springs out of the contract or transaction on which the action is founded; a set-off is in the nature of a cross action, and may be a separate and independent demand not connected with the original cause of action. *Washington v. Timberlake*, 259.
2. *Statute of limitations to plea of set-off.*—When a set-off is pleaded, and the statute of limitations is replied thereto, the statutory bar is to be computed, not to the commencement of the action, but to the time when the plaintiff's right of action accrued (Code, § 2996); and if the claim was then barred, it is not a "legal subsisting claim," and is not available as a set-off. *Ib.* 259.

SPECIFIC PERFORMANCE. See CHANCERY, 33-36.

STATUTES.

1. *Proviso to statute*.—The appropriate office of a proviso to a statute is to modify or limit the enacting clause, or to except something which would otherwise be included in it; and when annexed to a statute granting powers to a corporation, it will not be construed to enlarge those powers, or to operate as a grant of other privileges. *Street Railway Co. v. Kennerly*, 583.
2. *Retroactive laws changing rules of evidence*.—Laws affecting the admissibility or competency of evidence, in civil cases, pertain only to the remedy; and there is no constitutional provision, State or Federal, which takes away or limits the discretionary power of the General Assembly, in enacting or changing such laws, to make them applicable to pending actions, or existing causes of actions. *Goodlett v. Kelly*, 213.
3. *Construction not dependent on location in Code*.—The statute now forming section 3886 of the Code was enacted long after the three sections immediately preceding it (3883-85), which relate to bills of discovery; and its scope and meaning are not affected by its relative location in the Code. *Zelnicker v. Brigham & Co.*, 598.
4. *Legislative adoption of judicial construction*.—The former statute prescribing the duties of railroad engineers, and the liability of railroad companies for negligence (Rev. Code, §§ 1399, 1401), having been judicially construed by this court, and afterwards embodied without change in the Code of 1876 (§§ 1699, 1700), this is a legislative adoption of that construction. *Railroad Co. v. Bayliss*, 150.

SUBROGATION. —See CHANCERY, 37, 38, 42.

TAXATION, AND TAXES.

1. *Statutory exemptions from taxation*.—When a claim of exemption from taxation, total or partial, is asserted by a corporation or an individual, the legislative intent must be expressed in clear and unambiguous terms, and can not be inferred from language of doubtful import; the rule of construction, in reference to such statutes, requiring that "the narrowest meaning is to be taken which will fairly carry out the intent of the legislature." *Street Railway Co. v. Kennerly*, 583.
2. *Exemption from taxation, under charter of corporation*.—When an exemption from taxation, total or partial, is claimed by a private corporation under its charter, or act of incorporation, the courts require that the legislative intent to confer such exemption shall be expressed in clear and unambiguous terms; and if there is a just and reasonable doubt as to such intent, it is resolved against the corporation. *M. & S. H. Railroad Co. v. Kennerly*, 595.
3. *Constitutional inhibition against exemption from taxation*.—The constitution of 1819, which was in force in 1860, contained no limitation or restriction upon the power of the General Assembly, in the imposition of taxes, to make discriminations or exemptions in favor of either individuals or corporations. *Ib.* 566.
4. *Act incorporating Mobile and Spring Hill Railroad Company; limitation upon municipal taxation*.—Under the act incorporating the Mobile and Spring Hill Railroad Company, approved February 23d, 1860 (Sess. Acts 1859-60, p. 265), while it is declared that, in consideration of the privileges thereby granted, "the property of the company, and capital actually paid in, shall at all times be liable to the same rates of taxation as the property of individuals, and shall be taxed in no other way," the corporate authorities of the city of Mobile are authorized and empowered "to impose an annual taxation of one dollar on every one hundred dollars of the gross earnings of said company, which said tax," it is declared,

TAXATION, AND TAXES—*Continued.*

- "shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages." *Held*, that these provisions indicate a clear legislative intent to exempt the corporation, to the extent specified, from all other municipal taxation than that expressly authorized. *Ib.* 566.
5. *Same; how affected by change of municipality from city to port of Mobile.*—Whatever may be the legal relation existing between the "port of Mobile" and the former "city of Mobile," and the incidents attaching to that relation, the new corporation, like the old, has no power to impose on said railroad corporation any other tax or rate of taxation than that specified in said special charter. *Ib.* 566.
 6. *Commutation tax on railroads in Mobile; not applicable to corporation constructing road under special charter.*—By an act approved February 4th, 1860, the corporate authorities of the city of Mobile were authorized to grant to any person, association or company, the right and privilege of constructing a railroad along and through any streets in the city, for a period not longer than twenty years, and to prescribe the kind of rail to be used, the width and length of the track, the location of turnouts, &c.; and they were authorized to impose and collect, "from each company, person or association erecting any railway under the authority of this act," a tax of one dollar on every hundred dollars of the gross earnings of such railway company, which tax, it was declared, "shall be in lieu and in full of all taxes and impositions of any nature in favor of said city of Mobile, upon such railway, equipments, stock and appendages." The appellant corporation, chartered in 1858, under the name of the "Mobile Omnibus Company," was authorized by an act amending its charter, approved February 24th, 1860, "upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway or railways on any street or streets in said city; *provided*, however, that all restrictions, limitations and conditions prescribed in the act" above named, approved February 4th, 1860, "shall apply to said company, should it obtain the privilege from said city authorities to construct and use such railroad." *Held*, that the provision in reference to the special tax authorized by said act of February 4th, 1860, was not one of the "restrictions, limitations and conditions" referred to in the proviso; and that said corporation, having obtained the consent of the city authorities, and constructed its railroad through the streets of the city, could not claim the benefit of said provision, and was subject to other taxation. *Street Railway Co. v. Kennerly*, 583.
 7. *Municipal bonds in aid of railroad; injunction of tax to pay interest on.*—The corporate authorities of the city of Montgomery having been authorized, by special statute, to submit to a vote of the citizens the question of granting aid to the South and North Alabama Railroad Company, on the terms agreed on between the said corporate authorities and the directors of the railroad company, and to issue city bonds in aid of the railroad, if the election resulted in favor of subscription; the issue and negotiation of the city bonds might be enjoined, at the suit of individual citizens and taxpayers, on the grounds that a majority of those voting at the election did not in fact vote in favor of subscription, and that the propositions voted on were afterwards changed, to the detriment of the city, by agreement between the city authorities and the railroad directors, "if these facts had been shown at the proper time;" but, the bonds having been issued, being regular on their face, negotiable in form, and having passed into the hands of third persons, as purchasers for value, who are not charged with knowledge or

TAXATION, AND TAXES—*Continued.*

notice of any irregularity in their issue, as against them such irregularities avail nothing, and the tax-payers can not enjoin the collection of a municipal tax levied to pay the interest on them. *The State v. City Council of Montgomery*, 226.

8. *Same*; construction of special statute authorizing election; regularity of election, and subsequent proceedings; tax on real estate only. *Ib.* 226.

TENANTS IN COMMON.

1. *Erection of valuable improvements.*—If one tenant in common of lands erects valuable improvements thereon, with the express authority, or knowledge and implied consent of his co-tenant, a court of equity will, in decreeing partition, give him the benefit of his improvements, by assigning to him that part of the lands on which they are situated; and the claim for such improvements gives a court of equity jurisdiction to enjoin, at his instance, proceedings before the probate judge asking a sale for division. *Wilkinson v. Stuart*, 198.
2. *Rents and profits, for use and occupation.*—If one tenant in common use and occupy a portion of the lands, his entry and possession not being hostile to his co-tenant, he is not liable to account for rents and profits; and hence, when asking an equitable partition, and an allowance for the value of improvements erected by him, it is not necessary that he should offer in his bill to pay for his use and occupation. *Ib.* 198.

TENDER.

1. *Plea of tender.*—When a tender is pleaded, accompanied with the payment of the money into court, and the plea is sustained, the defendant is entitled to a verdict, but the money deposited becomes the property of the plaintiff. *Foster v. Napier*, 393.

TRESPASS.

1. *Right to repel by force.*—When the owner's possession of lands is invaded by a trespasser, who refuses or fails to leave on request, the owner may employ such force as may be necessary to remove the intruder, but no more. *Motes v. Bates*, 374.
2. *Trespass after warning*; criminal prosecution for. *Owens v. The State*, 401.

TRIAL OF RIGHT OF PROPERTY.

1. *Nature of statutory claim suit.*—A statutory claim suit, or trial of the right of property, is not an independent suit which may be inaugurated to determine the disputed title to property, but is consequential and dependent upon the levy of valid process against a third person. *Jackson v. Bain*, 328.
2. *Burden of proof.*—In such action, the plaintiff in the process is the actor, and the *onus* is on him to show the levy of valid process in his own favor, and to adduce *prima facie* evidence of the ownership of the property by the defendant in the process; and until he has done this, the claimant is not required to adduce any evidence. *Ib.* 328.
3. *Defects in process available to claimant.*—If the process levied on the property is void, the plaintiff can not recover in the statutory claim suit; and neither consent nor waiver, on the part of the defendant, can remedy the defect. *Ib.* 328.
4. *Trial of right of property by magistrate, without bond or affidavit.*—A justice of the peace, before whom an attachment is returnable, has

TRIAL OF RIGHT OF PROPERTY—*Continued.*

no jurisdiction to try the right or title to property levied on, at the instance of a third person who claims it, unless a claim is interposed under oath, and proceedings conducted in the manner prescribed by the statute; and consent of the parties can not confer jurisdiction of the subject-matter of a contest so initiated and conducted. *Walker v. Ivey*, 475.

TRUSTS, AND TRUSTEES.

1. *Trust created by deed.*—An express trust, as distinguished from a trust implied by law, is created by the direct and positive act of a party, manifested by some instrument of writing; and when the legal title to property is conveyed to one person, to be held by him for the benefit of another, an express trust is created, without regard to the particular words or form of the conveyance. *McCarthy v. McCarthy*, 546.
2. *Marriage-settlement construed as creating express trust; purchase of life-estate by trustee.*—A deed executed in contemplation of marriage, by which the grantor conveys property to a third person, "upon trust and confidence," and "for the sole use, profit and benefit of" the intended wife during her life, with remainder to the surviving child or children of the marriage, creates an express trust; and the wife, after the death of the husband and grantor, having sold and conveyed her interest to the trustee, declaring in the deed that, on her death, he was to surrender the property to her surviving child, the legal title is henceforth held by the trustee for his own use and benefit, during the life of the wife, with the right of possession and to collect and hold the rents and profits, and there is an express trust in favor of the remainder-man. *Ib.* 546.
3. *Statute of limitations, and adverse possession, as between trustee and beneficiaries.*—The statutes of limitation do not apply to express trusts, which are peculiarly and exclusively the subjects of equity jurisdiction, the possession of the trustee being considered the possession of the *cestuis que trust*, and not becoming adverse until there has been an open disavowal of the trust, brought home to the knowledge of the beneficiary with unquestionable certainty; and such a trust is only barred, on the doctrine of prescription, by the lapse of twenty years. *Ib.* 546.
4. *Discharge of trustee.*—A trustee may be discharged from his fiduciary relation, either by the expiration of the trust, or by its full performance, which involves a settlement between him and the beneficiary, and a surrender or transfer of the property; but the execution of a conveyance as a deed of gift, accompanied with a surrender of the property, can not operate to discharge him from his fiduciary relation, nor relieve him from liability to account for the rents and profits received, the beneficiary being an infant remainder-man, who had long resided with the trustee as a member of his family, and was ignorant of the existence of the trust. *Ib.* 546.
5. *Contracts of trustees; remedy of creditors.*—A trustee, express or implied, can not, in the absence of power specially conferred on him, impose a liability upon the trust estate by any contract or engagement he may make; and if he makes a contract which is beneficial to the estate, the person with whom he contracts has no equity to charge the estate, unless the trustee is insolvent, as shown by the exhaustion of legal remedies against him, and the trust estate is indebted to him. *Blackshear v. Burke*, 239.
6. *Same.*—The contracts of guardians, administrators, or other trustees, though made in execution of the trust, and in the performance of a legal duty, impose upon them a personal liability, and create no

TRUSTS, AND TRUSTEES—*Continued.*

liability against either the trust estate or the beneficiaries; but, if the estate is indebted to the trustee on settlement of his accounts, and he is insolvent, as shown by the exhaustion of legal remedies against him, and the contract has ensured to the benefit of the trust estate or its beneficiaries, a court of equity will subrogate the creditor to his rights against the estate. *Mosely & Eley v. Norman*, 422.

- 7 *Liability of trustees for acts and defaults of each other.*—The general rule is, that trustees are not ordinarily liable for the acts or defaults of each other, but each is liable only for such sums of money as he may receive in the due course of his fiduciary duties; yet, if one knowingly permits or acquiesces in a breach of trust or wrongful act of the other, or otherwise participates in a *derastavit* by him, he will be held liable as a co-principal; and also when, by his voluntary co-operation or connivance, he enables the other to accomplish some known object in violation of the trust. *Hinson v. Williamson*, 180; also, *Knight v. Haynie*, 542.
8. *Testamentary trusts; jurisdiction of Probate and Chancery Courts.* The Probate Court has no jurisdiction to enforce and settle a trust created by will; but, when such trust is conferred upon the executor, and distinct executorial duties are also devolved upon him by the will, that court, while declining to take cognizance of the trust, may settle all matters which pertain only to the executorial duties and office; unless the duties of the trust are attached to the executorial office or character, and are so inseparably blended and mingled with the executorial duties that they can not be distinguished from each other; in which case, if the trustee has accepted and undertaken the duties of the trust, the Probate Court has no jurisdiction to execute the will, and the parties will be remitted to the Chancery Court. *Hinson v. Williamson*, 180.
9. *When deed of trust may be enforced by beneficiaries.*—Sureties on a *supersedeas* bond, for whose indemnity a deed of trust has been executed by their principal, may file a bill to foreclose the deed so soon as the judgment is affirmed, and are not required to first pay it themselves; and if they pay the judgment pending the suit, thereby becoming themselves entitled to the proceeds of sale (which the bill prayed might be paid to the creditor), this is supplemental matter, which may be brought in by amendment; and the failure to bring it forward is a mere irregularity, which does not affect the validity of the final decree. *Cochran v. Miller*, 51.

USURY.

1. *Usury.*—Usurious interest, when paid, can not be recovered back; yet, if any part of the debt remains unpaid, and even when it is carried forward into a new transaction, this balance may be abated by deducting the usurious interest paid. *Noble v. Moses Brothers*, 604.

VENDOR AND PURCHASER.

1. *Sale of goods, with delivery of possession; rights of parties.*—On a sale of goods, even for cash, if the possession is delivered unconditionally to the purchaser, without any fraud on his part, the title at once vests in him, although the purchase-money is not paid; and the creditor can assert no lien on the goods, for the unpaid purchase-money. *Blackshear v. Burke*, 239.
2. *When misrepresentations constitute fraud.*—A misrepresentation of a material fact by the vendor of a chattel, made at the time of the sale, or pending the negotiations, on which the purchaser has the

VENDOR AND PURCHASER—*Continued.*

right to rely, and on which he does in fact rely, is a fraud, and furnishes a cause of action to the purchaser, or a ground of defense to an action for the purchase-money. *Tabor v. Peters*, 90.

3. *Warranty of chattel.*—No particular words are essential to constitute a warranty. As a general rule, there must be the affirmation of some fact, as distinguished from the mere expression of an opinion. Words of praise or commendation, such as are ordinarily used by the vendor of wares or chattels, however extravagant, impose no liability, either in the nature of a contract, or as a fraud; but a false statement, deliberately made, though in the form of an opinion, as to the quality, quantity, or condition of the thing sold, may amount to a warranty, if so intended and understood by the parties; and what would be mere matter of opinion, when spoken by a non-specialist, may be matter of fact when spoken by a specialist. *Ib.* 90.
4. *Same.*—A warranty, express or implied, does not cover defects which are external and visible, plain and obvious to inspection by the eye; but, even as to such defects, "the vendor would be guilty of a fraud, if he says or does any thing whatever with an intention to divert the eye, or to obscure the observation of the buyer." *Ib.* 90.
5. *Same; what are patent defects.*—On the sale of a patent right to an improved churn, which the vendor himself was manufacturing, and a specimen of which he exhibited to the purchaser, stating that it was made of juniper-wood (whereas it was made of white pine), and that the dasher was nickel-plated, and would not discolor the milk or butter (whereas it was in fact made of polished iron, which would discolor the milk and butter); the court can not say that the difference in the appearance of these substances is so plain and obvious as to bring the case within the principle applicable to patent defects. *Ib.* 90.
6. *Implied warranty as to suitability of chattel manufactured by vendor.*—The vendor of the patent right being himself the manufacturer of the patented churn, and contracting to furnish to the purchaser a sufficient number of the churns, he must be held to have stipulated that they were useful and reasonably suitable for the intended purpose; and if they proved to be worthless in fact, this would be a failure of consideration, resulting from the breach of the implied warranty, and available as a defense against the note given for the purchase-money. *Ib.* 90.
7. *Construction of title-bond.*—Under a stipulation in a bond for title, by which the vendor agrees, if the purchaser "should die before the last payment is made, and his wife is not able to pay the land out, to allot to her, by disinterested parties, the value of whatever amount has been paid on said land according to the within agreement," the right of the purchaser's widow to an allotment of the land *pro tanto* is dependent upon his death without having made the last payment, and is not restricted to the contingency of his death before the day appointed for the last payment and its non-payment on or before that day. *Simpson v. Williams*, 344.
8. *Abatement of purchase-money.*—When lands are conveyed with covenants of warranty against incumbrances done or suffered by the vendor (Code, § 2193), and are at the time subject to an outstanding mortgage executed by him, this is a breach of his covenants of warranty, which entitles the purchaser to claim an abatement of his note for the unpaid purchase-money, to the extent of the balance due on the mortgage debt, unless his note has been assigned to a third person, and he has estopped himself from setting up that defense against the assignee. *Wilkinson v. Searcy*, 243.

VENDOR AND PURCHASER—*Continued.*

9. *Vendor's lien; when assignee may assert.*—An assignee of a promissory note, given for the purchase-money of land, can not assert a vendor's lien on the land, when the transfer was by delivery merely. (Changed by statute approved Feb. 13, 1879.—Sess. Acts 1878-9, p. 171.) *Daily's Adm'r v. Reid*, 415.
10. *Same.*—Prior to the enactment of the statute approved February 13th, 1879 (Sess. Acts 1878-9, p. 171), the assignment of a promissory note, given for the purchase-money of land, did not pass to the assignee the right to enforce the vendor's equitable lien on the land, when the assignment was of such character that the vendor had no interest in the recovery of the debt, and would not sustain loss if it remained unpaid; the underlying principle being, that the equitable lien of the vendor was a trust chargeable upon the land for his security and indemnity, when he had taken no independent security for the payment of the purchase-money, because one man ought not to be allowed to get and keep the lands of another without paying the consideration money; and an assignee of the notes was allowed to enforce this lien, on the principle of subrogation, only when such subrogation was necessary for the protection and indemnity of the vendor. *Preston & Co. v. Ellington*, 133.
11. *Same; when vendor is remitted to original lien.*—The vendor's lien, although it did not pass to an assignee by delivery only, was not discharged or extinguished by the assignment; and if he again acquired the notes, he might enforce the lien as if he had never parted with them. *Ib.* 133.
12. *Same; assignment by delivery, and subsequent indorsement without new consideration.*—If the notes are transferred by delivery merely, not imposing on the vendor any liability for their ultimate payment, and not passing to the assignee the right to enforce the equitable lien on the land, a subsequent indorsement or assignment in writing by the vendor requires no new consideration to support it, and clothes the assignee with full capacity to enforce the lien on the land. *Ib.* 133.
13. *Assignment of notes for purchase-money; priority of lien, as between assignees and assignor.*—Several notes being given for the purchase-money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after the assigned notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court. *Preston & Co. v. Ellington*, 133.
14. *Vendor's lien; discharged by novation of contract.*—Where lands were sold by an executor, under authority conferred by a private statute, for the purpose of division and distribution among the parties interested under the will, five of whom became the purchasers, and gave their joint note for the deferred payment; and the sale was reported to the Chancery Court, as required by the statute, and was confirmed; and afterwards, in order to enable the executor to settle with the other devisees and distributees, the purchasers gave him receipts for their distributive shares of the estate, at an agreed valuation, in part payment of the note, and a new joint note for \$2,500, balance of purchase-money in excess of agreed valuation; and he thereupon reported the purchase-money paid in full, executed a conveyance to the purchasers under the order of the court, and charged himself with the purchase-money on final settlement of his accounts; and four of the purchasers paid their proportion of

VENDOR AND PURCHASER—*Continued.*

the \$2,500, but the fifth failed to pay any part of her proportion, the arrangement made by her husband for its payment having failed by reason of his misrepresentations to the executor; *held*, that the compromise, or settlement of the original note, was a novation of the contract, and discharged the land which, on subsequent division by agreement among the purchasers, was allotted to the defaulting distributee, from a vendor's lien for the unpaid balance. *Williams v. McCarty*, 295.

15. *Vendor's lien; who may assert, where land has been sold several times.*

Where the purchaser of lands agrees, in part payment of the agreed price, to pay his vendor's outstanding note to a third person, which is a lien on the land, and afterwards sells to a sub-purchaser, who makes a similar promise to pay the outstanding note; a payment of the note by such sub-purchaser would extinguish the lien on the land, and the liability of each of the parties; a payment by the purchaser would give him a right to enforce the vendor's lien on the land, as against the sub-purchaser; and a payment by the maker of the note, to whom the first promise to pay it was made, would give him a similar right to enforce the lien; but the latter can not maintain a bill in his own name alone to enforce the lien, when he has not paid the note, although the holder of it has recovered a judgment on it against him. But, on this state of the facts, the holder of the note is a necessary party to the bill, or the several contesting claimants, if there is a dispute as to the ownership of it; and the bill must allege the special facts which show that the maker of the note is remitted to his former right to enforce the lien, else the variance will be fatal to relief. *Young v. Hawkins*, 370.

16. *Whether contract is sale or lease, purchase or tenancy.*—A contract may be so framed as to operate either as a sale or as a lease—either a purchase or a tenancy; as in *Collins v. Whigham* (58 Ala. 438), where the contract was construed as giving the option to the purchaser, in the first instance, to treat it as a purchase or as a lease, and, on his failure to express his election by the day named, it was held that the vendor might elect. *Wilkinson v. Roper*, 140.17. *Same.*—Where lands are conveyed by absolute deed, with covenants of warranty, the purchaser giving his written obligation to deliver twelve bales of cotton to the vendor, in annual installments of four bales each, and a mortgage on the land to secure their payment; a stipulation in the mortgage in these words, "And in case of failure to make the first two payments on said land, then we agree and hereby promise to pay said W. [vendor] two bales of cotton each year for the rent of said lands," does not, of itself, show that the contract was a conditional sale, dependent on the payment of the first two obligations at maturity, and, on default of such payment, operating only as a lease from year to year. But the acts and conduct of the parties under the contract, as proved by receipts given and accepted, and other writings, show that they so understood and regarded it, or subsequently modified it, and that the cotton delivered was paid, not as purchase-money, but as rent. *Ib.* 140.18. *Loan of money to pay purchase-money of land; rights of lender, as against purchaser's widow.*—A person who lends or advances money to pay the purchase-money for lands, or to pay a decree which the vendor has obtained subjecting the land to sale in satisfaction of his lien, and who takes a mortgage or deed of trust on the lands to secure the repayment of the money, can not claim to be subrogated to the vendor's lien on the land, nor to have the decree revived and enforced in his favor; and the wife of the purchaser not joining with her husband in the execution of the mort-

VENDOR AND PURCHASER—*Continued.*

- gage or deed of trust, her right to dower in the lands is superior to the rights and equities of the lender. *Pettus v. McKinney*, 108.
19. *Protection to bona fide purchaser without notice.*—A *bona fide* purchaser for valuable consideration is entitled to protection against all latent equities of which he had no notice, whether he purchased under contract with the holder of the legal title, or at a sale under execution against him; but, whether a judgment creditor, purchasing at a sale under his own execution, and paying the price bid by entering satisfaction of his judgment, is entitled to protection as a *bona fide* purchaser for valuable consideration, is a question as to which there is some conflict of authority, and which does not arise in this case, the sale under execution being a nullity. *Bailey, Davis & Co. v. Timberlake*, 221.
20. *Notice of unrecorded mortgage; when purchaser is not chargeable with.*—A purchaser of cotton, or other crops, is not chargeable with notice of an unrecorded mortgage on them, given to secure the payment of the purchase-money for the land, because he has knowledge of the existence of the debt for the unpaid purchase-money. *Bell v. Tyson*, 353.

VERDICT. See CRIMINAL LAW, 66-69.

WILLS.

1. *Will authorizing executrix to keep estate together, and buy or sell property at discretion, construed as creating personal trust.*—Where the testator appointed his widow as executrix, and relieved her from giving bond; directed that his estate should be kept together “under her absolute power and control, she having full power to purchase or sell any property she may think proper, so long as she remains a widow;” that the annual profits of the estate should be invested by her in making purchases of property at her discretion, to be distributed among the children so as to equalize their distributive shares; and made provision for the immediate distribution of the estate, in the event of her death or marriage; *held*, that the will imposed upon the widow a personal trust in the matter of keeping the estate together, which was capable of execution by her alone; and she having refused to accept the trust, or qualify as executrix, the Probate Court could not confer on administrators *de bonis non* the power to execute it. *Hinson v. Williamson*, 180.
2. *Will authorizing executors to sell lands.*—Where the testator appointed his widow, his son and his son-in-law as executors of his will, made a specific devise and bequest to his widow and children, and added a clause in the following words: “My youngest child having heretofore attained the age of twenty-one years, I do not desire that my estate, or any part of it, should be kept together any longer than may be necessary for a convenient and equitable division. I authorize my executrix and executors to sell any part of my estate, directed to be divided among my wife and children, if it be found necessary to effect an equitable division; and such sales may be made at either public or private sale, and upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof; good security being required of the purchasers for all deferred payments, and if lands be sold, liens to be reserved on the lands sold, to be conveyed to the purchaser by my executrix or executors, or such of them as may be in office as such.” *Held*, that the will conferred a discretionary power to sell, which could only be executed by the joint act and concurrence of the executrix and executors, and could not be exercised by the sole executor who qualified. *Robinson v. Allison*, 254.

WITNESS.

1. *Competency of purchaser as witness, against heirs of deceased vendor.*—In a suit for the specific performance of a contract, instituted by the purchaser against the heirs of the deceased vendor, the complainant can not testify as a witness in his own behalf (Code, § 3058), as to the terms of the contract between himself and the deceased vendor. *Goodlett v. Kelly*, 213.
2. *Waiver of objection to such incompetency.*—The parties in adverse interest, in such case, may waive all objection to the competency of the plaintiff's testimony; but the objection is not waived by merely filing cross-interrogatories, after first objecting to his competency. *Ib.* 213.
3. *Recalling witness.*—The refusal to allow a witness to be recalled, for the purpose of laying a predicate to impeach him, is within the discretion of the primary court, and is not revisable. *Bell v. The State*, 430.
4. *Impeaching witness by proof of former statements.*—When it is sought to impeach a witness by showing discrepancies between his testimony and his former statements on the preliminary investigation before a committing magistrate, which were reduced to writing by the magistrate, and, for this purpose, he is cross-examined as to such former statements, it is not proper to read detached portions of them, and ask the witness if he did not so testify, but his entire testimony should be shown or read to him. *Wills v. The State*, 21.
5. *Same.*—The witness having been cross-examined as to his former statements, with a view of impeaching him, his entire testimony on that examination may be read to the jury in rebuttal; not as original evidence, but only for the purpose of enabling the jury to compare the two statements, and see how far they are consistent or inconsistent with each other. *Ib.* 21.
6. *Admission as to testimony of absent witness.*—An admission, made for the purpose of preventing a continuance, that an absent witness would, if present, testify as set forth in the affidavit submitted, is not an admission of his competency, nor of the relevancy of the facts as evidence; nor is it admissible for any purpose, on a trial at a subsequent term, although the witness has since died. *Ryan v. Beard's Heirs*, 306.
7. *Agreement as to testimony of absent witness.*—When there is an agreed statement as to the testimony of a witness supposed to be absent, but who comes into court during the trial, the statement should be suppressed, if duly objected to, and the witness examined orally; but the objection is waived, if not interposed until after the statement has been read to the jury. *Alfred v. Kennedy*, 326.
8. *Testimony of deceased witness.*—The testimony of a witness since deceased, given on the trial of a former suit, is admissible as evidence in a subsequent suit between the same parties, or their privies, respecting the title to the same property. *Goodlett v. Kelly*, 213.
9. *Deposition of witness present in court.*—When a witness, whose deposition has been taken, is personally present in court at the trial, and is competent to testify, his deposition should be suppressed, and he should be examined orally. *Humes v. O'Bryan & Washington*, 64.
10. *To what witness may testify.*—A witness may testify that he saw a game played with cards, or participated in the game, without giving a particular description of it; the accuracy of his knowledge being subject to the test of a cross-examination, if desired. *Johnson v. The State*, 557.

WITNESS—*Continued.*

11. *Effect of testimony, as against party introducing.*—As a general rule, a party can not impeach the general reputation or credibility of a witness introduced by him; yet it can not be asserted, as matter of law, that the testimony of a witness must always be taken most strongly against the party by whom he was introduced. *Coleman v. Siler*, 435.

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 167 813 3

